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The Federal Trade Commission and the Courts [Part 1]

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THE FEDERAL TRADE COMMISSION AND THE COURTS*

VERN COUNTRYMAN

Twenty years after the enactment of the Sherman Anti-Trust Law¹ the "trust problem" in the United States had become worse rather than better.² Whether this was due to the inherent inadequacy of the Sherman Act, the failure of the courts to give the Act its intended effect, the legal skill of defendants' counsel,³ or to a combination of these factors, has been a subject of much speculation. In any event, champions of anti-trust legislation began to entertain doubts as to the efficacy of existing law.

In 1911, the reading of the Rule of Reason into the Sherman Act⁴ heightened their anxiety and, furthermore, caused some considerable consternation among those elements of the populace at whom the Act was directed. This reaction had reached such proportions by 1912 that the platforms of all three political parties contained planks calling for new legislation. While the Republicans and the Progressives indorsed the creation of a federal commission to assist in the enforcement of legislation supplementary to the Sherman Act, the Democrats contented themselves with the advocacy of a more explicit definition of the policy and purposes of the existing law.⁵ Indeed, their standard bearer was the author of a very positive criticism of any such administrative tribunal.⁶

But after his election President Wilson apparently underwent a change of opinion on the matter. In any event, he called upon Congress not only for new legislation, but also for the creation of an Interstate Trade Commission, although he apparently envisaged that body as little

*This article was written in connection with Professor Conrad W. Oberdorfer's seminar on Trade Regulation, and with his assistance was prepared for publication.

¹26 STAT. 209 (1890), 15 U. S. C. § 1 *et seq.* (1934).

²ELIOT JONES, *THE TRUST PROBLEM IN THE UNITED STATES* (1929), 324.

³H. Thompson, *Highlights in the Evolution of the Federal Trade Commission* (1940), 8 GEO. WASH. L. REV. 257, suggests the latter two reasons.

⁴*Standard Oil Co. of New Jersey v. U. S.*, 221 U. S. 1 (1911).

⁵G. C. HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924), 16, 20.

⁶WOODROW WILSON, *THE NEW FREEDOM* (1913), 194.

more than an agency for investigation and publicity.⁷

Business men joined in the demand upon Congress for an administrative body, but they had a different purpose in mind. The Rule of Reason had added to the uncertainty as to the meaning of the vague, general terms of the Sherman Act, and business wanted an administrative agency which could give official advice in advance as to the legality of proposed transactions. Such industrial notables as Mr. E. H. Gary and Mr. George N. Perkins, among others, presented plans to the Senate embodying proposals along that line.⁸

But a majority of Congress had a still different idea as to what was needed. In their view, the Commission was to have positive powers for the enforcement of new legislation designed to supplement the existing law, in addition to the powers of investigation and publicity contemplated by the President. Accordingly, the plans of the industrial leaders were rejected, as apparently was Mr. William Howard Taft's assurance that the courts were quite capable of handling the entire matter under the Sherman Act,⁹ and in 1914 Congress enacted the Federal Trade Commission Act,¹⁰ creating a five-man commission with power to prevent "unfair methods of competition in commerce," together with additional powers of investigation and publicity.¹¹ Also enacted at the same session was the Clayton Act,¹² which gave the Federal Trade Commission the further authority to enforce its provisions against price discrimination, tying clauses, control of competitors through stock acquisitions, and interlocking directorates.¹³

While the Senate debates reveal that the members of that body did not have as clear a conception of what was included within the term "unfair methods of competition" in the F. T. C. Act as they had of the scope of the provisions of the Clayton Act, it is apparent that the supporters of the two Acts intended each of them to go beyond what

⁷51 CONG. REC. 1962 (1913).

⁸G. C. HENDERSON, *op. cit.* 22.

⁹W. H. TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* (1914), published after the 1914 legislation had passed the House, but while it was still being considered by the Senate.

¹⁰38 STAT. 717-724 (1914), 15 U. S. C. §§ 41-51 (1934).

¹¹Consideration of the Commission's powers of investigation and publicity under sections 6 and 9 of the F. T. C. Act, of its Trade Practice Conferences, and of its administration of the Webb-Pomerene Export Trade Act is beyond the scope of this article. On these topics see, generally, N. H. S. Stevens, *The Federal Trade Commission's Contribution to Industrial and Economic Analysis* (1940), 8 GEO. WASH. L. REV. 545; G. S. Kittelle and E. Mostow, *A Review of the Trade Practice Conferences of the Federal Trade Commission* (1940), 8 GEO. WASH. L. REV. 427; E. L. Love, *The Export Trade Act* (1940), 8 GEO. WASH. L. REV. 608.

¹²38 STAT. 730-740 (1914); 15 U. S. C. §§ 12-27 (1934).

¹³Under the F. T. C. Act, the Commission's original jurisdiction is exclusive. But the provisions of the Clayton Act entrusted to the Commission for enforcement are also enforceable by the Attorney-General or by private parties.

was covered by the Sherman Act, and not merely to stand as legislative definitions of the existing law.¹⁴

With the exception of the provision against interlocking directorates, wherein "the test of illegality was frankly the test of the Sherman Law,"¹⁵ this intent is clearly manifested in the terms of the Clayton Act, since the practices therein specified are illegal if the result of their use *may be* "to substantially lessen competition". In the F. T. C. Act no such clear evidence of intent is discernible, but no discovered decision has construed that act as limited to the scope of the Sherman Law. The judicial position is well expressed by Mr. Justice Stone, albeit in a dissenting opinion:¹⁶

"That ruinous competition, or the threat of it, when the aim is monopoly or the suppression of competition, may be the dominant factor in a violation of the Sherman Act is no longer fairly open to question. But, in determining the meaning of 'unfair methods of competition', it should be borne in mind that the Trade Commission's function is to discourage certain trade tendencies before violations of the Sherman Act have occurred. The advised use of the phrase 'unfair methods of competition' for the more familiar 'unfair competition' of the common law indicates an . . . intent to confer on the Commission the power . . . to prevent unfair trade practices not included in the prohibition of the Sherman Act and of the common law."

At the same time, and as a logical development from this view, it has been frequently declared by the courts that the public policy embodied in the Sherman Act should be considered as one element in determining what constitutes an unfair method of competition.¹⁷

Despite dire prognostications as to the unconstitutionality of the F. T. C. Act as an unlawful delegation of legislative¹⁸ and/or judicial¹⁹ power, and as so indefinite as to be void for uncertainty,²⁰ the Act has not been invalidated in any particular upon constitutional grounds. The lower federal courts have rejected contentions that it violates the separation of powers doctrine,²¹ or the due process clause,²² or that

¹⁴For a comprehensive analysis of the Senate debates, see G. H. Montague, *Unfair Methods of Competition* (1915), 25 YALE L. J. 20.

¹⁵G. C. HENDERSON, *op. cit.* 38. See discussion of this provision, p. 30, *infra*.

¹⁶Dissenting in *F. T. C. v. Eastman Kodak Co.*, 274 U. S. 619, 628 (1927).

¹⁷See, e. g.: *Butterick Publishing Co. v. F. T. C.*, 85 F. (2d) 522 (C. C. A. 2d, 1936); *F. T. C. v. Paramount Famous-Lasky Corp.*, 57 F. (2d) 152 (C. C. A. 2d, 1932).

¹⁸W. H. TAFT, *op. cit.* 116; Senator Brandegee, 51 CONG. REC. 14330 (1913).

¹⁹Senator Brandegee, *ibid.*

²⁰Senator Brandegee, *ibid.*; Senator Borah, 51 CONG. REC. 12456 (1913).

²¹*National Harness Mfr's Ass'n v. F. T. C.*, 268 Fed. 705 (C. C. A. 6th, 1920); *T. C. Hurst & Son v. F. T. C.*, 268 Fed. 874 (D. C. Va. 1920); *Sears, Roebuck & Co. v. F. T. C.*, 258 Fed. 307 (C. C. A. 7th, 1919).

²²*Chamber of Commerce v. F. T. C.*, 280 Fed. 45 (C. C. A. 8th, 1922); *T. C. Hurst & Son v. F. T. C.*, 268 Fed. 874 (D. C. Va. 1920).

its terms are so vague as to render the delegation of power unlawful.²³ And when the Supreme Court invalidated the legislative delegations in the N. R. A. for want of sufficiently definite standards, both Mr. Chief Justice Hughes for the majority and Mr. Justice Cardozo in his concurring opinion pointed to the F. T. C. Act as a model form of proper delegation.²⁴

But, while the courts have been most tolerant in proclaiming the lawfulness of the Congressional enactments, and most discerning in detecting the purpose for which they were enacted, a similar judicial attitude has not always greeted the Commission in its attempts to carry out that purpose. That tolerance has been absent and discernment lacking on many a bench before which the Commission appeared will be apparent from the pages to follow.

JURISDICTION, PROCEDURE AND REMEDIES

Jurisdiction

Under both the Federal Trade Commission Act and the Clayton Act, the Commission is given jurisdiction over all forms of business in interstate and foreign commerce,²⁵ except banks and common carriers.²⁶ But in 1921, jurisdiction over the packing industry was transferred to the Department of Agriculture under the Packers and Stockyards Act.²⁷

While the courts have seldom been called upon to define the Commission's jurisdiction, in the few instances where that question has been raised, the Commission has fared rather badly.

The Eighth Circuit has stated, in a case, reminiscent of the famous *Knight* case,²⁸ that Congress could give the F. T. C. no jurisdiction to restrain the efforts of a large sugar company with factories in three states to prevent competitors from establishing business in two of those states, because the manufacture of sugar is not "commerce" and interference with production does not directly affect commerce.²⁹ While

²³Sears, Roebuck & Co. v. F. T. C., 258 Fed. 307 (C. C. A. 7th, 1919).

²⁴Schechter Poultry Corp. v. U. S., 295 U. S. 495 (1935).

²⁵The Clayton Act does not apply to commerce with the Philippine Islands. Clayton Act § 1, 38 STAT. 730 (1914), 15 U. S. C. § 12 (1934).

²⁶Clayton Act § 11, 38 STAT. 734 (1914), 15 U. S. C. § 21 (1934). F. T. C. Act § 5, 38 STAT. 719 (1914), as amended, 52 STAT. 111 (1938), 15 U. S. C. § 45 (Supp. 1939). Fruit Growers' Express, Inc. v. F. T. C., 274 Fed. 205 (C. C. A. 7th, 1921), cert. granted, 257 U. S. 627 (1921); dismissed, 261 U. S. 629 (1923).

²⁷42 STAT. 161 (1921), 7 U. S. C. § 192 (1934). See *United Corp. v. F. T. C.*, 110 F. (2d) 473 (C. C. A. 4th, 1940), where, after the F. T. C. had taken jurisdiction over a meat canning corporation and had filed a complaint, the corporation acquired stock in a packing company so as to become a "packer" within the meaning of the Packers and Stockyards Act, and it was held that the F. T. C. immediately lost jurisdiction.

²⁸U. S. v. E. C. Knight Co., 156 U. S. 1 (1895). The *Knight* case was one of the authorities relied upon by the Circuit Court.

²⁹Utah-Idaho Sugar Co. v. F. T. C., 22 F. (2d) 122 (C. C. A. 8th, 1927). Apparently, in order to avoid an unconstitutional construction of the F.

the decision of the Supreme Court in *N.L.R.B. v. Jones & Laughlin Steel Corp.*³⁰ has renounced the theory of the *Knight* case, later cases concerning the F.T.C. have developed a new ground for limiting its jurisdiction which would also support the limitation imposed by the Eighth Circuit.

In *California Rice Industry v. F. T.C.*³¹ the provision in section 5 of the F.T.C. Act giving the Commission jurisdiction to prevent "unfair methods of competition in commerce" was literally construed to restrict the Commission to methods which actually were "in" commerce, and the existence of any jurisdiction over methods directly affecting commerce was expressly negated. Hence, it was held that, while the F.T.C. could prevent growers and millers of rice from fixing the price at which rice would be sold in interstate commerce, it could not interfere with practices of rice millers in California which reduced the amount of rice milled, although those practices clearly restricted the amount of milled rice shipped out of the state.

This construction of the statute is fortified by the decision of the Supreme Court in the recent case of *F.T.C. v. Bunte Bros.*³² where it was held that the F.T.C. could not restrain a large candy producer, manufacturing in Illinois, from marketing candy in that state by the "break and take" method, although competitors from other states had been so restrained. Mr. Justice Douglas, dissenting with Justices Black and Reed, pointed out that the jurisdiction of the Interstate Commerce Commission had been held to extend to local matters affecting interstate commerce, although the Interstate Commerce Act expressly denied the Commission jurisdiction where the transportation was "wholly within one state", but Mr. Justice Frankfurter replied for the majority that such a construction of the F.T.C. Act "would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. Such control bears no resemblance to the strictly confined authority growing out of railroad rate discrimination." It is submitted that, on any broad view, the construction contended for by the F.T.C. is just as essential to its work as a similar construction of the Interstate Commerce Act was to the work of the I.C.C.

In *Standard Container Mfr's Ass'n Inc. v. F.T.C.*³³ the *Bunte* case

T. C. Act, the court decided that Congress had not attempted to confer such jurisdiction upon the Commission. And see *Winslow v. F. T. C.*, 277 Fed. 206 (C. C. A. 4th, 1921), *cert. denied*, 258 U. S. 618 (1922): bribery by ship chandlers in course of sales to a foreign ship concerns purely intrastate transactions.

³⁰301 U. S. 1 (1937).

³¹102 F. (2d) 716 (C. C. A. 9th, 1939).

³²312 U. S. 349 (1941).

³³119 F. (2d) 262 (C. C. A. 5th, 1941).

was construed so as not to prevent the Commission from entering an order against all industries conspiring to fix prices in intrastate and interstate commerce, though some of the conspirators were engaged solely in intrastate commerce. But the only element distinguishing this case from the *Bunte* case is that here the intrastate industries acted in conjunction with industries actually doing business "in" interstate commerce. That this factor puts the trade practices of the intrastate operator "in" interstate commerce, and therefore beyond application of the *Bunte* rule, seems questionable.

While all of the above cases were based upon construction of the F. T. C. Act, the pertinent language of the Clayton Act is so similar that the same construction would necessarily have to be given to its provisions, so that the jurisdiction of the Commission clearly will have to be confined to activities actually "in" interstate commerce, regardless of which statute forms the basis for action.

As a matter of functional jurisdiction, the Circuit Courts hold that the F. T. C. has jurisdiction to enter a cease and desist order under the F. T. C. Act although the objectionable practice has ceased before the Commission issues its complaint,³⁴ or before its order is entered,³⁵ and the Supreme Court has given a similar construction to the Clayton Act in a case where the practice was discontinued after the F. T. C. order had been entered and while an appeal therefrom was pending.³⁶ But the Third Circuit has held that where, before the complaint is filed, the offender discontinues the practice and offers to stipulate that he will not resume it, the F. T. C. cannot enter a cease and desist order.³⁷

Procedure

Section 5 of the F. T. C. Act provides that when the Commission "shall have reason to believe that any . . . person . . . has been or is

³⁴*Educator's Ass'n, Inc. v. F. T. C.*, 108 F. (2d) 470 (C. C. A. 2d, 1939); *National Silver Co. v. F. T. C.*, 88 F. (2d) 425 (C. C. A. 2d, 1937); *Fairy-foot Products Corp. v. F. T. C.*, 80 F. (2d) 684 (C. C. A. 7th, 1935); *Arkansas Wholesale Grocers' Ass'n v. F. T. C.*, 18 F. (2d) 866 (C. C. A. 8th, 1927), *cert. denied*, 275 U. S. 533 (1927); *Chamber of Commerce v. F. T. C.*, 13 F. (2d) 673 (C. C. A. 8th, 1926); *Guarantee Veterinary Co. v. F. T. C.*, 285 Fed. 853 (C. C. A. 2d, 1922).

³⁵*F. T. C. v. McLean & Son*, 84 F. (2d) 910 (C. C. A. 7th, 1936); *F. T. C. v. Good-Grape Co.*, 45 F. (2d) 70 (C. C. A. 6th, 1930); *Lighthouse Rug Co. v. F. T. C.*, 35 F. (2d) 163 (C. C. A. 7th, 1929); *Juvenile Shoe Co., Inc. v. F. T. C.*, 289 Fed. 57 (C. C. A. 9th, 1923), *cert. denied*, 263 U. S. 705 (1923). Section 5 of the F. T. C. Act authorizes the Commission to act whenever it has reason to believe that any person "has been or is using any unfair method of competition, or unfair or deceptive act or practice." 38 STAT. 719 (1914) as amended, 52 STAT. 111 (1938), 15 U. S. C. § 45 (Supp. 1939). (Italics supplied.)

³⁶*F. T. C. v. Goodyear Tire & Rubber Co.*, 304 U. S. 257 (1938). Section 11 of the Clayton Act authorizes the Commission to act whenever it has reason to believe that any person "is violating or has violated any of the provisions" which the F. T. C. is authorized to enforce. 38 STAT. 734 (1914), 15 U. S. C. § 21 (1934). (Italics supplied.)

³⁷*John C. Winston Co. v. F. T. C.*, 3 F. (2d) 961 (C. C. A. 3d, 1925).

using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person . . . a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person . . . so complained of shall have the right to appear . . . and show cause why an order should not be entered by the Commission requiring such person . . . to cease and desist from the violation of the law so charged in said complaint.”³⁸ Section 11 of the Clayton Act³⁹ contains a similar provision, except that there is no requirement that it appear to the Commission that a proceeding would be to the interest of the public.

Upon this statutory foundation, and with its authority under section 6 (9) of the F. T. C. Act⁴⁰ to “make rules and regulations for the purpose of carrying out the provisions” of the F. T. C. Act,⁴¹ the Commission has erected its procedural system.

Preliminary Procedure. The information upon which the Commission acquires “reason to believe” that the law has been or is being violated comes either from initial investigation by the Commission or from charges made by consumers or competitors, followed up by investigation. With one class of cases excepted, most of the original information comes from outside parties. The Rules of Practice provide for an “application for complaint” and require that such application be written and signed, and contain a “short and simple statement of the facts constituting the alleged violation of law and the name and address of the applicant and the party complained of.”⁴² In practice, however, the rule often is not observed and the Commission has said that a letter setting forth the facts and accompanied by all the evidence in the possession of the complaining party is sufficient. Indeed, it is reported that the Commission also institutes investigations upon the basis of anonymous letters, if they contain specific allegations, rather than general denunciations.⁴³

Each charge of apparent merit is investigated by a member of the

³⁸38 STAT. 719, as amended, 52 STAT. 111 (1938), 15 U. S. C. § 45 (Supp. 1940).

³⁹38 STAT. 734 (1914), 15 U. S. C. § 21 (1934).

⁴⁰38 STAT. 721 (1914), 15 U. S. C. § 46 (1934).

⁴¹Although the rules are without express statutory authority, insofar as they apply to proceedings under the Clayton Act, such authority undoubtedly would be implied if its exercise were contested.

⁴²F. T. C. Rules of Practice (1941), Rule 7, 2 C. C. H. Tr. Reg. Serv. 15013. The F. T. C. is most careful in concealing the identity of the person supplying the information upon which the complaint is based. G. C. HENDERSON, *op. cit.* 64.

⁴³Attorney-General's Committee on Administrative Procedure, monograph No. 6, *The Federal Trade Commission* (1940), 119.

Commission's staff,⁴⁴ and his report, together with the recommendation of the Chief Examiner, either for dismissal, settlement by stipulation, or issuance of complaint, is submitted to the Commission for its determination of the action to be taken.

Information of false advertising is secured in another manner. To handle these cases, the Commission has created a Radio and Periodical Division with the sole duty of constantly investigating newspaper, magazine and radio advertising and reporting all unlawful activity, together with a recommendation of the action to be taken thereon, to the Commission.

The practice of giving each case the personal consideration of the Commissioners has been criticized as an unnecessary burden on Commissioners already overworked,⁴⁵ but a learned student of the Commission declares that this function could not be delegated—that it is a majority of the five Commissioners, and not some subordinate, who must have the “reason to believe” that the law has been or is being violated.⁴⁶ While so strict a construction of the statutory language seems undesirable, it is, perhaps, not unwarranted in view of the treatment given other provisions of the statute by the courts. In any event, this seems to be the construction adopted by the Commission.

Stipulations. Early in 1925 the Commission adopted a method of settling some cases by stipulation, rather than by prosecution. The stipulation used in this situation contains an admission of material facts, a promise to cease and desist, and an agreement that if thereafter the Commission has reason to believe that the stipulator is violating his promise to cease and desist and begins prosecution the admission may be used against him.⁴⁷ Such stipulations differ from consent decrees in that violation thereof is not a basis for sanctions, but must be followed up by prosecution.

Most violators are given an opportunity to avail themselves of this stipulation procedure and more cases are now settled by stipulation than by prosecution.⁴⁸ However, the violator is not allowed to settle by stipulation where the practices used involve fraud; false advertising of dangerous foods, drugs, devices or cosmetics; suppression or restraint of competition through conspiracy or monopolistic practices; or violations of the Clayton Act.⁴⁹

⁴⁴During the investigation, the party investigated is given ample opportunity to present facts in his defense. Robert E. Freer, *Federal Trade Commission Procedure and Practice* (1940), 8 GEO. WASH. L. REV. 316, 318.

⁴⁵Attorney-General's Committee, *op. cit.* 19.

⁴⁶G. C. HENDERSON, *op. cit.* 50.

⁴⁷For a case where the admissions were so used, see *Rock v. F. T. C.*, 117 F. (2d) 680 (C. C. A. 7th, 1941).

⁴⁸During the fiscal year ending June 30, 1938, 564 cases were settled by stipulation and 310 complaints were issued. F. T. C., ANNUAL REPORT (1938), 94.

⁴⁹F. T. C., Statement of Policy (1941), 2 C. C. H. Tr. Reg. Serv. 15021.

Complaints. If the case is not dismissed or settled by stipulation, the Commission issues and serves⁵⁰ its complaint. Both the Clayton Act⁵¹ and the F. T. C. Act⁵² require that the complaint contain a statement of the Commission's charges and include a notice of hearing at a day and place at least thirty days after the service of the complaint. The framing of the charges has been a matter of paramount importance since the decision of the Supreme Court in the *Gratz* case⁵³ that unless the complaint sets forth sufficient facts to show on its face a violation of the law, an order based thereon will be set aside, regardless of the sufficiency of the evidence to support the order.

With respect to prosecutions under the Clayton Act, the issuance of complaints is solely in the discretion of the F. T. C. But the F. T. C. Act recites that "if it shall appear to the Commission that a proceeding by it . . . would be to the interest of the public" it shall issue and serve a complaint,⁵⁴ and out of this language the courts have framed a jurisdictional requirement—if there is no public interest in the case (and this question is for the court in the last instance), the Commission is without authority to issue the complaint.⁵⁵ This construction of the statute seems wholly unwarranted—it could with as much logic be held that the courts should review the question of the Commission's reason to believe that the law has been or is being violated. The statutory language seems clearly designed as a guide to the Commission in the exercise of its discretion and nothing more. Moreover, as is indicated by a careful student of the statute,⁵⁶ there seems to be no reason to disregard the words, "if it shall appear to the Commission that a proceed-

⁵⁰Service of the complaint, orders and other processes of the Commission may be by personal service, by leaving a copy at the principal office or place of business, or by registered mail. Clayton Act § 11, 38 STAT. 734 (1914), 15 U. S. C. § 21 (1934); F. T. C. Act § 5, 38 STAT. 719 (1914), as amended, 52 STAT. 111 (1938), 15 U. S. C. § 45 (Supp. 1939). The Rules provide for service by registered mail unless one of the other methods is specifically ordered by the Commission. F. T. C. Rules of Practice (1941), Rule 3, 2 C. C. H. Tr. Reg. Serv. 15011.

⁵¹Clayton Act § 11, 38 STAT. 734 (1914), 15 U. S. C. § 21 (1934).

⁵²F. T. C. Act § 5, 38 STAT. 719 (1914), as amended, 52 STAT. 111 (1938), 15 U. S. C. § 45 (Supp. 1940).

⁵³*F. T. C. v. Gratz*, 253 U. S. 421 (1920). See also, *Century Metalcraft Corp. v. F. T. C.*, 112 F. (2d) 443 (C. C. A. 7th, 1940); *Heuser v. F. T. C.*, 4 F (2d) 632 (C. C. A. 7th, 1925).

⁵⁴F. T. C. Act § 5, 38 STAT. 719 (1914), as amended, 52 STAT. 111 (1938), 15 U. S. C. § 45 (Supp. 1939).

⁵⁵*F. T. C. v. Klesner*, 280 U. S. 19 (1929); *Flynn & Emrich Co. v. F. T. C.*, 52 F. (2d) 836 (C. C. A. 4th, 1931); *Standard Oil Co. v. F. T. C.*, 282 Fed. 81 (C. C. A. 3d, 1922); *New Jersey Asbestos Co. v. F. T. C.*, 264 Fed. 509 (C. C. A. 2d, 1920); *F. T. C. v. Gratz*, 258 Fed. 314 (C. C. A. 2d, 1919).

⁵⁶G. C. HENDERSON, *op. cit.* 53. See also J. L. Mechem, *Procedure and Practice Before the Federal Trade Commission* (1922), 21 MICH. L. REV. 125, 139: "It would seem that the determination of public interest is an administrative function only, not open to judicial review, except, perhaps, where such determination is so arbitrary as to be beyond the powers of the Commission and to work a denial of due process."

ing would be to the interest of the public." Nonetheless, the requirement is now firmly established in the case law governing the Commission, and the element of public interest must be alleged in the complaint and supported by the evidence in all prosecutions under the F. T. C. Act.⁵⁷

Answer. Although the statutes make no provision for any form of pleading by the respondent, the Rules of the Commission require the filing of an answer within 20 days of the service of the complaint, which answer shall contain a concise statement of facts constituting the ground of defense and shall specifically admit or deny or explain each fact alleged in the complaint, unless respondent is without knowledge, in which case he shall so state.⁵⁸ Failure to answer *and* failure to appear are deemed to authorize the Commission, without further notice, to proceed upon the charges.⁵⁹ But there is no taking of default judgment. The hearing is held and evidence is taken in support of the complaint just as if respondent had appeared.⁶⁰ Moreover, even though the respondent fails to file an answer, he may appear at the hearing and controvert the allegations of the complaint, since the statutes provide that the person complained of shall have the right to appear and show cause why an order should not be issued against him.⁶¹

Hearing. Hearings are had before trial examiners, who make their report to the Commission, with the actual decision, based on this report, coming from the Commission. The manner of conducting the hearings has seldom been attacked in the courts. However, it has been decided that the respondent is not denied a fair hearing merely because the examiner requires him to put in his evidence before the government's case is closed.⁶² Nor is he entitled to examine confidential reports to the Commission, used by the Commission's witness to refresh his recol-

⁵⁷That no such showing need be made under Clayton Act, see *Webb-Crawford Co. v. F. T. C.*, 109 F. (2d) 268 (C. C. A. 5th, 1940), *cert. denied*, 310 U. S. 638 (1940).

⁵⁸F. T. C. Rules of Practice (1941), Rule 9, 2 C. C. H. Tr. Reg. Serv. 15013. This rule also provides for an answer which admits the allegations of facts and which is treated as a demurrer, except that if the Commission rules against respondent he cannot plead further. Disputes as to fact can also be resolved by stipulation.

⁵⁹*Ibid.*

⁶⁰Robert E. Freer, *op. cit.* 323.

⁶¹Clayton Act § 11, 38 STAT. 734 (1914), 15 U. S. C. § 21 (1934); F. T. C. Act § 5, 38 STAT. 719 (1914), as amended, 52 STAT. 111 (1938), 15 U. S. C. § 45 (Supp. 1939).

⁶²*California Lumbermen's Council v. F. T. C.*, 115 F. (2d) 178 (C. C. A. 9th, 1940), *cert. denied*, 312 U. S. 709 (1941). See the previous opinion of the Circuit Court in this case, *California Lumbermen's Council v. F. T. C.*, 103 F. (2d) 304 (C. C. A. 9th, 1939), holding that a motion to strike the transcript of the F. T. C. record is not the proper manner of raising the fairness of the hearing, and suggesting, most indirectly, that the proper method would be a petition to set aside the order on appeal, which method was used in the second case.

lection, but not considered by the Commission in reaching its decision.⁶³

Although the F. T. C. Act, in authorizing the Commission to issue subpoenas,⁶⁴ makes no provision for the use of this power on behalf of the respondent, the Rules of Practice do make this power available to the respondent on written application.⁶⁵

The statute⁶⁶ contains an immunity provision which deprives any witness of his right to refuse to testify or produce other evidence on the grounds of self-incrimination.⁶⁷ By the terms of the statute, the immunity is extended only as to evidence given in response to a subpoena.⁶⁸ It seems now to be settled that the privilege against self-incrimination must be claimed in order to get the protection of the immunity.⁶⁹

Neither the F. T. C. Act nor the Clayton Act mentions the kind of evidence which shall be received and, except for a provision relating to segregation of relevant from irrelevant matter in documents offered in evidence,⁷⁰ the Rules of Practice make no such provision either. However, the trial examiners' rulings on admissibility of evidence seldom have been contested in court, and never successfully. The rule established by the few decided cases is that the Commission is not restricted to the use of legally competent evidence, but can use evidence "of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs."⁷¹ It has been stated by a member of the Commission that, as a matter of practice, the examiners

⁶³*Alberty v. F. T. C.*, 118 F. (2d) 669 (C. C. A. 9th, 1941), *cert. denied*, 62 Sup. Ct. 62 (1941).

⁶⁴F. T. C. Act § 9, 15 STAT. 722 (1914), 15 U. S. C. § 49 (1934).

⁶⁵F. T. C. Rules of Practice (1941), Rule 15, 2 C. C. H. Tr. Reg. Serv. 15015. But mandamus will not lie from a District Court to compel the F. T. C. to issue subpoenas. *McFadden Publications v. F. T. C.*, 37 F. (2d) 822 (App. D. C. 1930). Respondent's remedy is limited to raising objections in the Circuit Court on appeal, or upon petition by the F. T. C. to enforce its order. Review by the Circuit Court is the exclusive remedy, and it is limited to final orders. *Chamber of Commerce v. F. T. C.*, 280 Fed. 45 (C. C. A. 8th, 1922).

⁶⁶F. T. C. Act § 9, 38 STAT. 722 (1916), 15 U. S. C. § 49 (1934).

⁶⁷*See Brown v. Walker*, 161 U. S. 591 (1896), sustaining a similar statute applicable to proceedings of the Interstate Commerce Commission.

⁶⁸*Sherwin v. U. S.*, 268 U. S. 369 (1925); *Cannon v. U. S.*, 19 F. (2d) 823 (C. C. A. 5th, 1927); *Pandolfo v. Biddle*, 8 F. (2d) 142 (C. C. A. 8th, 1925).

⁶⁹It was held in *U. S. v. Pardue*, 294 Fed. 543 (S. D. Texas, 1923), that the privilege need not be claimed, but the contrary rule was established in *Sherwin v. U. S.*, 297 Fed. 704 (C. C. A. 5th, 1924), *aff'd*, 268 U. S. 369 (1925).

⁷⁰F. T. C. Rules of Practice (1941), Rule 17, 2 C. C. H. Tr. Reg. Serv. 15015.

⁷¹*John H. Bene & Sons v. F. T. C.*, 299 Fed. 468, 471 (C. C. A. 2d, 1924). *See, to the same effect, F. T. C. v. Good-Grape Co.*, 45 F. (2d) 70 (C. C. A. 6th, 1930); *Arkansas Wholesale Grocers' Ass'n v. F. T. C.*, 18 F. (2d) 866 (C. C. A. 8th, 1927); *Hills Bros. v. F. T. C.*, 9 F. (2d) 481 (C. C. A. 9th, 1926). In support of such a rule, *see Albert E. Stephan, The Extent to Which Fact-Finding Boards Should Be Bound by Rules of Evidence* (1938), 24 A. B. A. J. 630; A. T. Vanderbilt, *The Technique of Proof Before Administrative Bodies* (1939), 24 Iowa L. Rev. 464.

rarely permit any departure from the rules of evidence in federal equity causes.⁷²

No oral argument is heard by, and no briefs are submitted to the trial examiner at the close of the taking of evidence, though the examiner is empowered to receive from counsel on each side a written statement of their contentions as to the facts proved.⁷³ After the examiner's report upon the evidence is submitted to the Commission, briefs may be filed with the Commission,⁷⁴ and oral argument before the Commission may be allowed.⁷⁵ The briefs, argument and examiner's report are then considered by one (or sometimes all) of the Commissioners and, after discussion of his recommendations the disposition to be made of the case is finally determined by the entire Commission.

Remedies

Orders of the Commission. The statutes provide that if the Commission be of the opinion that any of the provisions of the law have been violated, it shall serve on the violator an order to cease and desist from such violations.⁷⁶ Section 11 of the Clayton Act⁷⁷ also authorizes an order requiring the violator to divest itself of stock held in violation of the section 7, or to rid itself of directors chosen contrary to the provisions of section 8.

Under these provisions it has been judicially determined that the Commission can order the violator so to divest itself of stock held in violation of section 7 of the Clayton Act as not to use the control resulting therefrom to secure the assets of the corporation whose stock is held, but that it cannot order the divestment of assets so secured before the complaint is filed.⁷⁸ Similarly, it was held that the Commission had no authority under the F. T. C. Act to order a motion picture film manufacturer to dispose of certain film development laboratories which it had acquired in order, by threat of competition, to coerce other development companies into buying all film from it (this practice having been found to violate section 5.)⁷⁹

Immediately after the first of these cases had established the principle of the race of diligence, the F. T. C. adopted the practice of issuing complaints without affording respondents the chance to be heard in

⁷²Robert E. Freer, *op. cit.* 327.

⁷³F. T. C. Rules of Practice (1940), Rule 22, 2 C. C. H. Tr. Reg. Serv. 15017.

⁷⁴*Ibid.* Rule 23.

⁷⁵*Ibid.* Rule 24.

⁷⁶F. T. C. Act § 5, 38 STAT. 719 (1914), as amended, 52 STAT. 111 (1938), 15 U. S. C. § 45 (Supp. 1939); Clayton Act § 11, 38 STAT. 734 (1914). 15 U. S. C. § 21 (1934).

⁷⁷*Ibid.*

⁷⁸*Western Meat Co. v. F. T. C.*, 272 U. S. 554 (1926).

⁷⁹*F. T. C. v. Eastman Kodak Co.*, 274 U. S. 619 (1927). See also *J. W. Kobi v. F. T. C.*, 23 F. (2d) 41 (C. C. A. 2d, 1927).

advance which was previously given in all cases.⁸⁰

But the violators were given another opportunity to evade the Commission's order by a subsequent decision holding that the Commission had no authority to order a divestiture of assets acquired by use of stock control (secured in violation of the Clayton Act) to effect a merger of competing companies after the complaint was filed.⁸¹ Since the statute,⁸² and probably the Constitution,⁸³ requires that the respondent be given notice of the proceedings against him before an order can issue, all odds are in favor of the violator in the race of diligence in this situation.

Another difficulty, inherent in the nature of the activities controlled by the Commission, is that of framing the language of the order. An order to cease use of an advertisement, the precise text of which is set forth,⁸⁴ is too easily evaded by a slight alteration of the wording of the advertisement, whereas an order which attempts to anticipate every possible evasion may disintegrate into "little more than an injunction to be honest."⁸⁵ Between the Scylla of too great particularity, and the Charybdis of over-generality, then, the Commission must steer its course in drafting orders.

Judicial Review. The Clayton Act.⁸⁶ and originally the F. T. C. Act,⁸⁷ provided that the Commission might apply to the Circuit Courts of Appeals for the enforcement of its orders, that the respondent might appeal thereto from the orders, and that the Courts should have jurisdiction to affirm, set aside or modify the order, which jurisdiction should be exclusive.⁸⁸ In 1938 the provisions of the F. T. C. Act were amended

⁸⁰J. A. McLAUGHLIN, CASES ON THE FEDERAL ANTI-TRUST LAWS (1933), 300, n. 94.

⁸¹Arrow-Hart & Hegeman Elec. Co. v. F. T. C., 291 U. S. 587 (1934). Nor can the F. T. C. prevent the violator from acquiring the assets of a competitor by suing on a bona fide debt and levying upon the property. Western Meat Co. v. F. T. C., 33 F. (2d) 824 (C. C. A. 9th, 1929); Aluminum Co. of America v. F. T. C., 284 Fed. 401 (C. C. A. 3d, 1922), cert. denied, 261 U. S. 616 (1923).

⁸²Clayton Act. § 11, 38 STAT. 734 (1914), 15 U. S. C. 21 (1934).

⁸³See Note (1934) 34 Col. L. Rev. 322.

⁸⁴See, for instance, the order in *In re Plunkett Chemical Co.*, 3 F. T. C. 53 (1920).

⁸⁵G. C. HENDERSON, *op. cit.* 77. See, for example, the orders in *In re Boston Piano & Music Co.*, 3 F. T. C. 168 (1920) and *In re Raymond Bros.-Clark Co.*, 3 F. T. C. 295 (1921). With reference to the latter order, the Circuit Court observed, while vacating it on other grounds, "the order set forth is as broad as the business world, and in any event would have to be modified if it were to be sustained in any particular." *Raymond Bros.-Clark Co. v. F. T. C.*, 280 Fed. 529 (C. C. A. 8th, 1922).

⁸⁶Clayton Act § 11, 38 STAT. 734 (1914), 15 U. S. C. § 21 (1934).

⁸⁷F. T. C. Act § 5, 38 STAT. 719 (1914).

⁸⁸Certiorari does not lie in C. C. A. to contest jurisdiction of the F. T. C. because of alleged unconstitutionality of the F. T. C. Act. The statute makes appeal an exclusive remedy. *Chamber of Commerce v. F. T. C.*, 280 Fed. 45 (C. C. A. 8th, 1922). The statutes also provide for review of the C. C. A. decision by the Supreme Court on certiorari.

by the Wheeler-Lea Act⁸⁹ providing, generally, that orders of the Commission become final if no appeal is filed within sixty days of service of the order, and that such final order may be enforced by penalties for violation, collected in a civil action brought in the District Court by the Department of Justice.⁹⁰

This amendment leaves the respondent with his remedy of appeal to the Circuit Court, but relieves the Commission of the possible necessity of proving a second and subsequent violation of the law before it can get a court order enforcing its order, and of proving a third violation in contempt proceedings to compel obedience to the court's order. Of course, this is still the method for enforcement of orders under the Clayton Act, since the Wheeler-Lea Act did not modify the Clayton Act.

On appeal, or upon application by the Commission for enforcement of its order (now required only under the Clayton Act), the Commission is required to send up a transcript of the entire record of the proceeding, including all testimony taken and the report and order of the Commission.⁹¹

The chief ground for appeal or for defense on the Commission's application for enforcement, is that the Commission has erred in finding that respondent's activities constituted a violation of law. Under established administrative law formulae, this involves a question of law, which is ultimately to be determined by the courts.⁹² Consequently, the Commission's definitions of unfair methods of competition, or of violations of the Clayton Act, as including the practices of the respondent, are

⁸⁹52 STAT. 111 (1938), 15 U. S. C. § 45 (Supp. 1939). For enforcement of an order under this statute, see *U. S. v. Piuma*, 40 F. Supp. 119 (S. D. Cal. 1941).

⁹⁰That this amendment is not unconstitutional, as an unlawful delegation of legislative or judicial powers to the F. T. C., or as violative of the equal protection or due process clauses, see *Ostler Candy Co. v. F. T. C.*, 106 F. (2d) 962 (C. C. A. 10th, 1939), *cert. denied*, 309 U. S. 675 (1940); *National Candy Co. v. F. T. C.*, 104 F. (2d) 999 (C. C. A. 7th, 1939), *cert. denied*, 308 U. S. 610 (1939). Note (1940) 34 ILL. L. REV. 626 makes a valiant attempt to pick out some situations in which the final order might be subject to collateral attack on constitutional grounds, but succeeds in rebutting most, if not all, of its own arguments.

⁹¹F. T. C. Act § 5, 38 STAT. 719 (1914), as amended, 52 STAT. 111 (1938), 15 U. S. C. § 45 (Supp. 1939); *F. T. C. v. Inecto, Inc.*, 70 F. (2d) 370 (C. C. A. 2d, 1934). Clayton Act § 11, 38 STAT. 734 (1914), 15 U. S. C. § 21 (1934). It has twice been held that the examiner's report need not be made a part of the record. *Algoma Lbr. Co. v. F. T. C.*, 56 F. (2d) 774 (C. C. A. 9th, 1932), *aff'd*, 291 U. S. 67 (1934); *Raladam Co. v. F. T. C.*, 42 F. (2d) 430 (C. C. A. 6th, 1930), *aff'd*, 283 U. S. 643 (1931). But see *Kidder Oil Co. v. F. T. C.*, 117 F. (2d) 892 (C. C. A. 7th, 1941), holding that the statute either requires that the examiner's report be made a part of the record or leaves it to the discretion of the C. C. A. to consider the report. The Rules of Practice had expressly provided that the examiner's report should not be included in the record, but after this case that provision was deleted by 1941 amendment. F. T. C. Rules of Practice (1941), Rule 20, 2 C. C. H. Tr. Reg. Serv. 15016.

⁹²This doctrine was first established, with relation to F. T. C. proceedings, in *F. T. C. v. Gratz*, 253 U. S. 421 (1920).

reviewed by the courts, and the difference between judicial and Commission definitions has led to the setting aside of more of the Commission's orders than has any other ground of appeal.⁹³

The statutes provide that the findings of the Commission as to the facts, if supported by testimony, shall be conclusive,⁹⁴ but this leaves to the determination of the courts the all-important question as to whether or not the findings are supported by testimony. The Supreme Court evidenced an unusual generosity toward the fact-finding process of the Commission in *F. T. C. v. Pacific States Paper Trade Ass'n.*⁹⁵ But some of the Circuit Courts were not so liberally inclined,⁹⁶ and it was not until the Supreme Court had administered a verbal spanking to the Ninth Circuit in *F. T. C. v. Algoma Lbr. Co.*,⁹⁷ followed by another liberal holding in favor of the Commission in *F. T. C. v. Keppel & Bros.*,⁹⁸ that the Circuit Courts finally came around to a more generous approach.⁹⁹

On the whole, it may be said that the courts are now giving the findings of the Commission adequate treatment,¹⁰⁰ overturning them only where the evidence does seem not to support them.¹⁰¹ However, the

⁹³Recall that the courts have also taken over the review of the question of public interest in proceedings under the F. T. C. Act on the theory that this involved a "matter of law", p. 9, *supra*.

⁹⁴F. T. C. Act § 5, 38 STAT. 719 (1914), as amended, 52 STAT. 111 (1938), 15 U. S. C. § 45 (Supp. 1939); Clayton Act § 11, 38 STAT. 734 (1914), 15 U. S. C. § 21 (1934).

⁹⁵273 U. S. 52, 61 (1927): "The weight to be given to the facts and circumstances admitted, as well as the inference reasonably to be drawn from them is for the Commission."

⁹⁶*See, e. g., Algoma Lbr. Co. v. F. T. C.*, 64 F. (2d) 618 (C. C. A. 9th, 1933); *F. T. C. v. Paramount Famous-Lasky Corp.*, 57 F. (2d) 152 (C. C. A. 2d, 1932); *V. Vivaudou v. F. T. C.*, 54 F. (2d) 273 (C. C. A. 2d, 1931); *Western Sugar Refinery Co. v. F. T. C.*, 275 Fed. 725 (C. C. A. 9th, 1921).

⁹⁷291 U. S. 67 (1934).

⁹⁸291 U. S. 304 (1934). *See also F. T. C. v. Standard Education Society*, 302 U. S. 112 (1937).

⁹⁹*See Fioret Sales Co., Inc. v. F. T. C.*, 100 F. (2d) 358 (C. C. A. 2d, 1938) and *L. & C. Mayers Co. v. F. T. C.*, 97 F. (2d) 365 (C. C. A. 2d, 1938), wherein Judge Manton reverses the position he had taken in the *Vivaudou* and *Paramount Famous-Lasky* cases. *See also F. T. C. v. Inecto, Inc.*, 70 F. (2d) 370 (C. C. A. 2d, 1934) and *F. T. C. v. A. McLean & Son*, 84 F. (2d) 910 (C. C. A. 7th, 1936), *cert. denied*, 299 U. S. 590 (1936), the court in the latter case finding a presumption in support of the Commission's findings. The Third Circuit came to the startling conclusion that the *Algoma* case had established that "the fact findings of the Commission are not to be regarded as merely persuasive." *F. T. C. v. Artloom Corp.*, 69 F. (2d) 36, 37 (C. C. A. 3d, 1934).

¹⁰⁰*Accord: William G. Daniels, Judicial Review of the Fact Findings of the Federal Trade Commission* (1939), 14 WASH. L. REV. 37; J. F. Davison, *The Place of the Federal Trade Commission in Administrative Law* (1940), 8 GEO. WASH. L. REV. 280. *But see Goodyear Tire & Rubber Co. v. F. T. C.*, 101 F. (2d) 620 (C. C. A. 6th, 1939), introducing into F. T. C. jurisprudence the time-honored, but rather questionable concept of mixed questions of fact and law.

¹⁰¹*See Belmont Laboratories v. F. T. C.*, 103 F. (2d) 538, 542 (C. C. A. 3d, 1939): "We may say that the examination of the witnesses gives the impression that the Federal Trade Commission's legal staff did not equip

Supreme Court in an earlier decision, written by Mr. Justice McReynolds, expressed one very questionable proposition which still lingers in F. T. C. jurisprudence. In *F. T. C. v. Curtis Publishing Co.*,¹⁰² it was held that if it appeared to the Court that material facts were not reported by the Commission and if "in the interest of justice the controversy should be decided without further delay," the court could examine the record and make additional findings itself, instead of sending the case back to the Commission. Mr. Chief Justice Taft wrote a separate opinion, joined in by Mr. Justice Brandeis, in which he questioned the propriety of the Court's usurping the fact-finding functions of the Commission. The rule of this case has been accepted in subsequent decisions in the lower courts without question,¹⁰³ but the present judicial tendency gives reason to hope that the "additional facts" doctrine will be repudiated when next the point is raised in the Supreme Court.

A few cases have involved an attack on the Commission's orders on the ground of unfairness at the hearing, but, while the courts have accepted this factor as a proper ground for setting aside the order, they have not yet found instances of actual unfairness.¹⁰⁴

The Circuits have disagreed as to the procedure which must be taken by the F. T. C. to get its order enforced by the courts. The Seventh Circuit holds that the Commission must prove violation of the order before the court will take jurisdiction to affirm it, and must prove a new violation of the affirmed order before the violator can be found in contempt.¹⁰⁵ On the other hand, the Second, Fourth and Ninth Circuits will determine the validity of the order on application, but will not decree enforcement until violation is proved, and it is only violation of a decree of enforcement which will subject the violator to contempt proceedings.¹⁰⁶ As to prosecutions under the F.T.C. Act, this difficulty is

itself with even the elementary medical books we borrowed from a local physician." And see *Kidder Oil Co. v. F. T. C.*, 117 F. (2d) 892 (C. C. A. 7th, 1941), holding that the fact that the trial examiner's report differs from the Commission's findings "materially detracts from the Commission's claim that its findings are substantially supported."

¹⁰²260 U. S. 568 (1923).

¹⁰³*James S. Kirk & Co. v. F. T. C.*, 59 F. (2d) 179 (C. C. A. 7th, 1932); *F. T. C. v. Paramount Famous-Lasky Corp.*, 57 F. (2d) 152 (C. C. A. 2d, 1932); *V. Vivaudou v. F. T. C.*, 54 F. (2d) 273 (C. C. A. 2d, 1931).

¹⁰⁴*Alberty v. F. T. C.*, 118 F. (2d) 669 (C. C. A. 9th, 1941), *cert. denied*, 62 Sup. Ct. 62 (1941) (Examiner refused to allow respondent to inspect confidential report to Commission, used by Commission's witness to refresh his recollection, but not considered by F. T. C. in making its decision.); *California Lumbermen's Council v. F. T. C.*, 115 F. (2d) 178 (C. C. A. 9th, 1940) (Respondent was required to put in his evidence before F. T. C.'s case was closed.).

¹⁰⁵*F. T. C. v. Fairyfoot Products Co.*, 94 F. (2d) 844 (C. C. A. 7th, 1938); *F. T. C. v. Standard Education Society*, 14 F. (2d) 947 (C. C. A. 7th, 1926).

¹⁰⁶*F. T. C. v. Balme*, 23 F. (2d) 615 (C. C. A. 2d, 1928), *cert. denied*, 277 U. S. 598 (1928); *F. T. C. v. Baltimore Paint & Color Works*, 41 F. (2d) 474 (C. C. A. 4th, 1930); *Electro Thermal Co. v. F. T. C.*, 91 F. (2d) 477 (C. C. A. 9th, 1937), *cert. denied*, 302 U. S. 748 (1938).

obviated by the Wheeler-Lea Act, which, in addition to dispensing with the old method of enforcement of orders under the F. T. C. Act, gives the Circuit Courts the power, on appeal from such orders, not only to affirm, modify, or set aside the Commission's order as under the original F. T. C. Act and the Clayton Act, but also to enforce "the same to the extent that the order is affirmed," and to "issue such writs as are ancillary to its jurisdiction or are necessary . . . to prevent injury to the public or to competitors' *pendente lite*," and provides that, to the extent the order is affirmed, the court shall issue its own order commanding obedience to the terms of the Commission's order.¹⁰⁷

The Circuit Courts have made extensive use of their power to modify the Commission's orders. Orders directing respondent to cease an unfair method of competition consisting in the use of misleading trade names have been modified in cases involving long-established names, either to permit continued use of the names with qualifying words which are designed to avoid the previously existing element of deception,¹⁰⁸ or to allow the respondent an extension of time within which to use the old name in conjunction with a new one, so that the public will have an opportunity to identify the product with the new name before the old one is abandoned.¹⁰⁹

Two distinct lines of authority have grown up in the cases forbidding lottery sales of candy. One line holds that an order forbidding a manufacturer to sell candy in packages that "may" be sold by gaming methods is too broad as imposing upon the manufacturer a responsibility for unfair methods of retailers, and modifies the order by replacing the objectionable word with the phrase "are designed to."¹¹⁰ The other line of cases holds that the order is not too broad and could

¹⁰⁷52 STAT. 111 (1938), 45 U. S. C. § 45 (Supp. 1939).

¹⁰⁸*Educator's Ass'n, Inc. v. F. T. C.*, 108 F. (2d) 470 (C. C. A. 2d, 1938); *Fioret Sales Co., Inc. v. F. T. C.*, 100 F. (2d) 358 (C. C. A. 2d, 1937); *F. T. C. v. Hires Turner Glass Co.*, 81 F. (2d) 362 (C. C. A. 3d, 1935); *F. T. C. v. Maisel Trading Post*, 77 F. (2d) 246 (C. C. A. 10th, 1935); *Royal Milling Co. v. F. T. C.*, 58 F. (2d) 581 (C. C. A. 6th, 1932); *F. T. C. v. Morrissey*, 47 F. (2d) 101 (C. C. A. 7th, 1931); *F. T. C. v. Good-Grape Co.*, 45 F. (2d) 70 (C. C. A. 6th, 1930); *F. T. C. v. Cassoff*, 38 F. (2d) 790 (C. C. A. 2d, 1930); *N. Fluegelman & Co. v. F. T. C.*, 37 F. (2d) 59 (C. C. A. 2d, 1930). Such modification will not be made where the only effect of possible additional legends would be to contradict, rather than to qualify a deceptive trade name. *H. N. Heusner & Son v. F. T. C.*, 106 F. (2d) 596 (C. C. A. 3d, 1939); *El Moro Cigar Co. v. F. T. C.*, 107 F. (2d) 429 (C. C. A. 4th, 1939); *F. T. C. v. Army & Navy Trading Co.*, 88 F. (2d) 776 (App. D. C., 1937).

¹⁰⁹*H. N. Heusner & Son v. F. T. C.*, 106 F. (2d) 596 (C. C. A. 3d, 1939); *Masland Dural Leather Co. v. F. T. C.*, 34 F. (2d) 733 (C. C. A. 3d, 1929); *See Note* (1940) 38 MICH. L. REV. 752, favoring such modification.

¹¹⁰*Sweets Co. of America v. F. T. C.*, 109 F. (2d) 296 (C. C. A. 2d, 1940) (See dissent in this case, suggesting that manufacturer be required to label the packages, "Not to be sold by chance."); *Helen Ardelle, Inc. v. F. T. C.*, 101 F. (2d) 718 (C. C. A. 9th, 1939); *F. T. C. v. Charles N. Miller Co.*, 97 F. (2d) 563 (C. C. A. 1st, 1938); *F. T. C. v. McLean & Son*, 84 F. (2d) 910 (C. C. A. 7th, 1936).

not be construed to impose such responsibility on the manufacturer.¹¹¹

F. T. C. orders have also been modified to conform to the allegations of the complaint and the findings of the Commission,¹¹² to eliminate provisions based on findings not supported by evidence,¹¹³ and to eliminate provisions as to matters over which the Commission has no jurisdiction.¹¹⁴

It might well have been decided that the power of the Circuit Courts to modify orders of the Commission was confined to the correction of technical defects of the sort involved in the cases last mentioned and should not include the power to vary the nature or terms of the order in situations where the courts disagreed with the Commission's ideas of enforcement policy and technique, but the manner in which the courts have construed and exercised their power in this respect seems never to have been challenged by the Commission, and the inertia of the decided cases precludes any such contention now.

PROTECTION OF COMPETITION

Under the Federal Trade Commission Act, the F. T. C. is authorized to prevent the use of "unfair methods of competition in commerce."¹¹⁵ The Clayton Act also authorizes the Commission to prevent the specific practices of price discrimination,¹¹⁶ use of tying clauses,¹¹⁷ acquisition of stock of competitor corporations,¹¹⁸ and establishment of interlocking directorates among competitors,¹¹⁹ as therein defined. In some instances a trade practice may violate the provisions of both acts. In a few instances, a violation of the Clayton Act will not also constitute a violation of the F. T. C. Act. In many instances, a violation of the F. T. C. Act will not also constitute a violation of the Clayton Act.

Price Discrimination

The Clayton Act, as originally passed, made it unlawful to discriminate in price between purchasers buying commodities in interstate or foreign commerce "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Specific exemptions were provided for differentials

¹¹¹*Ostler Candy Co. v. F. T. C.*, 106 F. (2d) 962 (C. C. A. 10th, 1939), *cert. denied*, 309 U. S. 675 (1940); *National Candy Co. v. F. T. C.*, 104 F. (2d) 999 (C. C. A. 7th, 1939), *cert. denied*, 308 U. S. 610 (1939).

¹¹²*Century Metalcraft Corp. v. F. T. C.*, 112 F. (2d) 443 (C. C. A. 7th, 1940).

¹¹³*Belmont Laboratories v. F. T. C.*, 103 F. (2d) 538 (C. C. A. 3d, 1939).

¹¹⁴*Ibid.*

¹¹⁵F. T. C. Act § 5, 38 STAT. 719, 15 U. S. C. § 45 (1934). The addition of the phrase "and unfair or deceptive acts or practices in commerce" by the Wheeler-Lea Act will be discussed under the title, *Protection of the Consumer*, to appear in the next issue.

¹¹⁶Clayton Act § 2, 38 STAT. 730 (1914), as amended, 49 STAT. 1526 (1936), 15 U. S. C. § 13 (Supp. 1939).

¹¹⁷Clayton Act § 3, 38 STAT. 731 (1914), 15 U. S. C. § 14 (1934).

¹¹⁸Clayton Act § 7, 38 STAT. 731 (1914), 15 U. S. C. § 18 (1934).

¹¹⁹Clayton Act § 8, 38 STAT. 732 (1914), 15 U. S. C. § 19 (1934).

made on account of differences in the "grade, quality or quantity of the commodity sold," or to allow for differences in selling or transportation cost, or in good faith to meet competition.¹²⁰

The Commission's prosecutions under this statute got off to a bad start in the courts. In *Mennen Co. v. F. T. C.*¹²¹ the Second Circuit held that the F. T. C. could not prevent a manufacturer from classifying his customers as "wholesalers" and "retailers," according to the nature of the resale, rather than the quantity purchased, as a basis for giving a larger trade discount to the former than to the latter. This holding was based on the court's construction of the statute as forbidding price discrimination only where there was tendency to monopoly or to the lessening of competition *between the manufacturer and his competitors*, and not between customers of the manufacturer. This restrictive interpretation was induced, said the court, by the fact that Congress had substituted the phrase it construed for the words in the original bill, "with the purpose or intent thereby to destroy or wrongfully injure the business of a competitor of either such purchaser or seller." Apparently the court was unaware of the fact that when the bill was finally reported out of conference to the House, it was explained by Congressman Webb that the purpose of the substitution was "to give the section more elasticity and breadth."¹²² The court also held that the methods here used by the manufacturer were not unfair methods of competition under Section 5 of the F. T. C. Act.

A year later the same court again reversed the Commission on its decision that a similar method of classifying customers for purposes of allowing quantity discounts violated Section 2 of the Clayton Act and Section 5 of the F. T. C. Act, re-affirming its construction of the Clayton Act in the *Mennen* case.¹²³ These decisions clearly limited the application of Section 2 to the practice of local price-cutting employed by such large industries as the Standard Oil Company, and since this practice had become much less prevalent by that time anyway because of its destructive effect upon consumer good-will, the effect of the decisions was to render the statute practically nugatory.¹²⁴

A few years later, however, in a suit between private litigants, the Supreme Court expressly rejected the construction given Section 2 in the above cases and held that the statute was violated where the effect of a price discrimination was substantially to lessen competition between

¹²⁰Clayton Act § 2, 38 STAT. 730 (1914). This section also contained a proviso specifically allowing persons to select their own customers "in bona fide transactions . . . not in restraint of trade."

¹²¹288 Fed. 774 (C. C. A. 2d, 1923), *cert. denied*, 262 U. S. 759 (1923).

¹²²51 CONG. REC. 16273 (1914).

¹²³*National Biscuit Co. v. F. T. C.*, 299 Fed. 733 (C. A. A. 2d, 1924), *cert. denied*, 266 U. S. 613 (1924).

¹²⁴J. A. McLAUGHLIN, *op. cit.* 423, n. 119.

the buyer and his competitors. The terms of the statute were perfectly plain, said the court—there was no occasion for resort to Congressional records: the statute applied if there was a substantial lessening of competition in *any* line of commerce, and “any” included the line of commerce in which the buyer was engaged.¹²⁵

Reinstatement of the statute in this respect, however, was followed by discovery of another point of vulnerability, culminating in the decision in *Goodyear Tire & Rubber Co. v. F. T. C.*¹²⁶ that price differentials based on quantity, as allowed under the statute, need not bear any reasonable relation to the cost of transportation or selling, inasmuch as the statute contained another proviso, construed to be exclusive, dealing with the latter factors. Support for this construction was found in the fact that the amendment to Section 2 by the Robinson-Patman Act (which was not applicable in this case) did require a consideration of manufacturing, selling and delivery costs in fixing quantity discounts. This decision does seem to represent a proper interpretation of the statutory language on this point—apparently the case involved a situation not anticipated by Congress.

Although the F. T. C. was unable to get a single order based on Section 2 of the Clayton Act through the courts,¹²⁷ it did get judicial approval of one order bearing upon price discrimination in an indirect manner under Section 5 of the F. T. C. Act. In *Western Sugar Refining Co. v. F. T. C.*¹²⁸ the court upheld an order directing certain jobbers to cease inducing manufacturers to discriminate in prices against a wholesale company competing with the jobbers. While the court sustained the Commission's determination that the jobbers' actions constituted an unfair method of competition, Section 2 of the Clayton Act was clearly inapplicable to them, since they were not the persons doing the discriminating.

In 1936 Congress replaced Section 2 with the Robinson-Patman Act,¹²⁹ a statute designed to make some alterations in the judicial construction of Section 2, and to expand the area of the Commission's control over price-discriminating activities.

Subdivision (a) re-enacts Section 2 of the Clayton Act, in somewhat different form. It forbids price discrimination between purchasers in

¹²⁵*George Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245 (1929), followed in *American Can Co. v. Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th, 1930), *cert. denied*, 282 U. S. 899 (1930).

¹²⁶101 F. (2d) 620 (C. C. A. 6th, 1939), *cert. denied*, 308 U. S. 557 (1940).

¹²⁷An order based on Section 2 and directing termination of the notorious Pittsburgh Plus system, *In re U. S. Steel Corp.*, 8 F. T. C. 1 (1924), was never taken into court. Instead, “the Corporation inaugurated a more complicated system of basing points which ameliorated without extinguishing the most serious cause of complaint . . .” J. A. McLAUGHLIN, *op. cit.* 288, n. 82.

¹²⁸275 Fed. 725 (C. C. A. 8th, 1921).

¹²⁹49 STAT. 1526 (1936), 15 U. S. C. § 13 (Supp. 1939).

sales in interstate or foreign commerce of commodities of like grade and quality, where the effect of the discrimination may be substantially to lessen competition or to tend to create a monopoly in any line of commerce "or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." Apparently the quoted clause means that discrimination is forbidden if it injures, destroys or prevents competition between: (1) the seller and his competitors, or (2) the buyer and his competitors (the construction of Section 2 contended for by the Commission)¹³⁰ or (3) customers of the buyer and their competitors. Clearly, the operation of the new statute was not intended to be confined to cases of local price-cutting.

Subdivision (a) also expressly allows price differentials which "make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities" of sale or delivery (thus rendering obsolete the law of the *Goodyear* case)¹³¹ and subdivision (b) seems to allow a differential made in good faith to meet an equally low price of a competitor.¹³²

While the Commission has entered several orders under these provisions directing the termination of simple price discrimination,¹³³ and of quantity discounts not based solely on manufacture, sales and delivery cost,¹³⁴ and has found price discrimination in one case where the manufacturer used different brands on differently priced articles, and contended that the articles were not "of like grade and quality,"¹³⁵

¹³⁰This construction is given to the provision by the Commission. *In re Standard Brands, Inc.*, 29 F. T. C. 121 (1939); *In re Williams & Wilkins Co.*, 29 F. T. C. 678 (1939); *In re American Optical Co.*, 28 F. T. C. 169 (1939); *In re Bausch & Lomb Optical Co.*, 28 F. T. C. 186 (1939).

¹³¹But the F. T. C. is authorized, after investigation and hearing, to fix quantity limits as to certain commodities where it finds that available purchasers in greater quantities "are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce." The Commission has never exercised this authority. Attorney-General's Committee, *op. cit.* 65.

¹³²The provision of the Clayton Act allowing bona fide selection of customers is retained in subdivision (a), and it is also provided that the amendment does not prevent price changes "in response to changing conditions affecting the market for or the marketability of the goods concerned."

¹³³*In re American Oil Co.*, 29 F. T. C. 857 (1939); *In re Williams & Wilkins Co.*, 29 F. T. C. 678 (1939); *In re Christmas Club, Inc.*, 25 F. T. C. 1116 (1937).

¹³⁴*In re Simmins Co.*, 29 F. T. C. 727 (1939); *In re Standard Brands, Inc.*, 29 F. T. C. 121 (1939); *In re Master Lock Co.*, 27 F. T. C. 982 (1938); *In re H. C. Brill Co.*, 26 F. T. C. 666 (1938). Several of these orders have been specifically directed against basing point systems: *In re Rowe Mfg. Co.*, 27 F. T. C. 1376 (1938); *In re Calcium Chloride Ass'n*, 27 F. T. C. 1354 (1938).

¹³⁵*In re U. S. Rubber Co.*, 28 F. T. C. 1489 (1939). See A. E. Sawyer, *The Commission's Administration of Paragraph 2(a) of the Robinson-Patman Act* (1940), 8 GEO. WASH. L. REV. 469, for a complete appraisal of the Commission's work under this part of the Act.

none of its orders in this field have been reviewed by the courts, so that the extent to which the Robinson-Patman Act has changed the law of price discrimination as it was under Section 2 of the Clayton Act has not yet been judicially determined.

Subdivision (c) of the new Act makes it unlawful for any person, in the course of interstate or foreign commerce, to pay or receive "anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods . . . either to the other party to such transaction or to an agent . . . or other intermediary therein where such intermediary is acting . . . in behalf, or is subject to the . . . control of any party to such transaction other than the person by whom such compensation is so . . . paid."

It is clear that the provision was aimed at price discrimination through camouflaged rebates. But that is about all that is clear. The ambiguity, of course, arises from the inclusion of the phrase "except for services rendered in connection with the sale or purchase of goods."

In the five cases in which F. T. C. orders under the Robinson-Patman Act have been subjected to judicial review, the Commission has been sustained in its view that the "services rendered" clause does not set up a condition upon which brokerage may be paid to buyers, their agents or intermediaries.¹³⁶ These holdings have aroused a great amount of speculation as to what effect the "services rendered" clause does have. One suggestion is that it was inserted to make it clear that his subdivision did not apply to a payment for true brokerage services rendered by an independent broker in the professional sense of the term,¹³⁷ but this de-emphasizing explanation has not satisfied the writers.¹³⁸ If the notion that the clause was inserted to satisfy the demands of voluntary cooperative groups¹³⁹ is correct, it means that the provision was unavailing, for it was held in *Quality Bakers of America v. F. T. C.*¹⁴⁰ that brokerage fees paid to a bakers' association on account of purchases made by the association for its members constituted a payment of the fees to the members in violation of

¹³⁶*Quality Bakers of America v. F. T. C.*, 114 F. (2d) 393 (C. C. A. 1st, 1940); *Webb-Crawford Co. v. F. T. C.*, 109 F. (2d) 268 (C. C. A. 5th, 1940); *Great Atlantic & Pacific Tea Co. v. F. T. C.*, 106 F. (2d) 667 (C. C. A. 3d, 1939), *cert. denied*, 308 U. S. 625 (1940), *pet. rehear. denied*, 309 U. S. 694 (1940); *Oliver Bros. v. F. T. C.*, 102 F. (2d) 763 (C. C. A. 4th, 1939); *Biddle Purchasing Co. v. F. T. C.*, 96 F. (2d) 687 (C. C. A. 2d, 1938), *cert. denied*, 305 U. S. 634 (1938).

¹³⁷Representative Utterback, 80 CONG. REC. 9418 (1936).

¹³⁸See S. C. Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act* (1940), 8 GEO. WASH. L. REV. 511, n. 12; Note (1937) 6 GEO. WASH. L. REV. 214; Note (1936) 50 HARV. L. REV. 114.

¹³⁹Note (1938) 51 HARV. L. REV. 1303.

¹⁴⁰114 F. (2d) 393 (C. C. A. 1st, 1940).

the Act.¹⁴¹ Another suggestion,¹⁴² said to be favored by the F. T. C., is that the exception is designed to permit brokerage payments to intermediaries who actually render services to the seller *and* retain the fees so earned, instead of passing them on to the buyer. While there is a dictum in one of the cases to the effect that the provision cannot be so construed,¹⁴³ one case did base its determination that the broker was not a "true intermediary," acting for both parties, on the fact that it did not retain the brokerage payments, the implication being that if the payments had been retained, the statute would not have been violated.¹⁴⁴ And in *Oliver Bros. v. F. T. C.*,¹⁴⁵ the court assumed that subdivision (c) of the Act permitted dual representation, but observed, on the facts before it, that "this is a very different thing from the buyer receiving the compensation."¹⁴⁶

This interpretation does seem the most reasonable of all those suggested, if any meaning is to be given to the "services rendered" clause, and it may well be that when the appropriate case is presented to the courts, this construction will receive their more explicit blessing.

One other proposition has been clearly established by the decisions construing subdivision (c), namely, that this subdivision is wholly independent of subdivision (a), so that there need be no proof of an injurious effect upon competition, and that a cost justification on the basis of manufacturing, selling or delivery expense is no defense to prosecution for unlawful brokerage allowance. And the Act, as so construed, was held to be within Congress' commerce power, and not violative of the due process clause.¹⁴⁷

Subdivisions (d) and (e) of the Robinson-Patman amendment make it unlawful for the seller to compensate a customer for services or

¹⁴¹This case also illustrates a payment to the buyer in value other than cash. The association here applied a part of the fees on membership dues and operating expenses. However, the members received the balance in the form of dividends on stock.

¹⁴²Note (1939) 24 WASH. U. L. Q. 607; Note (1937) 6 GEO. WASH. L. REV. 214.

¹⁴³*Great Atlantic & Pacific Tea Co. v. F. T. C.*, 106 F. (2d) 667 (C. C. A. 3d, 1939), *cert. denied*, 308 U. S. 625 (1940), *pet. rehear. denied*, 309 U. S. 694 (1940).

¹⁴⁴*Biddle Purchasing Co. v. F. T. C.*, 96 F. (2d) 687 (C. C. A. 2d, 1938), *cert. denied*, 305 U. S. 634 (1938). The broker retained the payments in *Webb-Crawford Co. v. F. T. C.*, 109 F. (2d) 268 (C. C. A. 5th, 1940), but there was no proof that it had rendered any service for the seller.

¹⁴⁵102 F. (2d) 763, 770 (C. C. A. 4th, 1939).

¹⁴⁶*Cf. Quality Bakers of America v. F. T. C.*, 114 F. (2d) 393 (C. C. A. 1st, 1940), wherein the court said that, even if the agent did render service to the seller, subdivision (a) was violated where the agent remitted the brokerage payments to the buyer.

¹⁴⁷*Great Atlantic & Pacific Tea Co. v. F. T. C.*, 106 F. (2d) 667 (C. C. A. 3d, 1939), *cert. denied*, 308 U. S. 625 (1940), *pet. rehear. denied*, 309 U. S. 694 (1940); *Oliver Bros. v. F. T. C.*, 102 F. (2d) 763 (C. C. A. 4th, 1939); *Biddle Purchasing Co. v. F. T. C.*, 96 F. (2d) 687 (C. C. A. 2d, 1938), *cert. denied*, 305 U. S. 634 (1938).

facilities furnished by or through the customer in connection with the processing, handling, sale or offering for sale of products, or to provide the services or facilities himself, unless such compensation is available to "all other customers competing in the distribution of such products," or such services and facilities are available "to all purchasers", on "proportionately equal terms."

One case decided by the F. T. C. under these provisions illustrates the difficulties which will arise thereunder. In *In re Golf Ball Mfr's Ass'n*,¹⁴⁸ manufacturers of golf balls were compensating the Professional Golfers' Association for the use of the insignia "P. G. A." on the manufacturers' product. Part of the compensation was retained by the Golfers' Association and part of it was passed on to its members, who were retail sellers of golf balls. The Commission found all parties to be guilty of a violation of subdivision (d) of the statute.

But if the policy of the Robinson-Patman Act is directed against price discrimination, it would seem that this situation should not come within the terms of the Act. The customer here had something unique to provide—something which other customers could not provide. And, it not being alleged or shown that the value of the insignia had no reasonable relation to the compensation given, there is no apparent element of price discrimination involved. Nonetheless, it must be admitted that the F. T. C.'s order represents a correct literal application of the statute. But, inasmuch as a contrary application seems possible here without doing violence to statutory language, it may well be that when such a case gets to the courts the statute will be so construed as not to forbid this sort of transaction.

Tying Clauses

Section 3 of the Clayton Act¹⁴⁹ makes it unlawful to lease, sell or contract for the sale of commodities, or to fix a price, rebate or discount on the condition, agreement or understanding that the lessee or purchaser will not use or deal in the commodities of competitors of the lessor or seller, where the effect of such arrangement may be substantially to lessen competition or to tend to create a monopoly. This section was obviously designed to cover the practice of "full-line forcing," whereby the purchaser of a product agrees to use only the seller's line of accessories or materials used or consumed in the use of the product originally purchased (the most common concept of a "tying clause"), and to include as well, general contracts to handle the products of the seller exclusively.

Although the Second and Eighth Circuits upheld cease and desist

¹⁴⁸26 F. T. C. 824 (1938). Other cases are pending. *In re Bourgois, Inc.*, Docket 2972; *In re Richard Hudnut*, Docket 2973; *In re Elmo, Inc.*, Docket 2974; *In re Coty, Inc.*, Docket 2975; *In re Curtin Bros.*, Docket 3381; *In re General Motors Corp.*, Docket 3866.

¹⁴⁹38 STAT. 731 (1914), 15 U. S. C. § 14 (1934).

orders of the Commission in open and shut cases involving sales of clothes patterns to 20,000 retailers under contracts not to handle patterns of competitors¹⁵⁰ and the giving of discounts to service stations by a manufacturer of a famous automobile carburetor on the condition that they carry no competing line,¹⁵¹ the Supreme Court gave the statute a rather violent construction by holding that it was not violated where a distributor leased gasoline tanks and pumps to service station operators on the condition that only the lessor's gasoline would be used therein. That this agreement was directly within the terms of Section 3 seems uncontrovertible. That it had the effect of substantially lessening competition seems obvious, if consideration is given to the spatial and economic limitations of many service station operators. Yet Mr. Justice McReynolds observed that:

"Many competitors seek to sell excellent brands of gasoline The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes, and may discontinue any or all of them. He may carry on his business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum ["The devices are not expensive—\$300 to 500 . . ."] he can buy an outfit and use it without hindrance."¹⁵²

From this premise it was concluded that there was no substantial lessening of competition within the meaning of the Clayton Act. It is perhaps a sufficient commentary on Justice McReynold's rationale to point out that if there is no substantial lessening of competition because the operator can buy another pump, there can be no violation of section 3 by full-line forcing contracts in any case except where the seller has a monopoly of the principal product.

Thereafter the Seventh Circuit, apparently influenced by the attitude of the Supreme Court, set aside a cease and desist order directed against a manufacturer of 1 per cent of the oleomargarine and butter produced in the United States, which sold its products to wholesalers on the condition that they would not deal in the products of competitors. There was no evidence, said the court, that the agreement "would, under the circumstances disclosed, possibly lessen competition or create an actual tendency to monopoly."¹⁵³ While this same court later upheld the Commission in forbidding a manufacturer of music rolls for player

¹⁵⁰*Butterick Co. v. F. T. C.*, 4 F. (2d) 910 (C. C. A. 2d, 1925), *cert. denied*, 267 U. S. 602 (C. C. A. 2d, 1925).

¹⁵¹*Carter Carburetor Corp. v. F. T. C.*, 112 F. (2d) 722 (C. C. A. 8th, 1940). The court was influenced by the fact that the manufacturer occupied such a dominating position in the carburetor business that stations had to have his brand in stock if they wanted to give any kind of carburetor service.

¹⁵²*F. T. C. v. Sinclair Refining Co.*, 261 U. S. 463, 474 (1923).

¹⁵³*C. S. Pearsall Butter Co. v. F. T. C.*, 292 Fed. 720, 722 (C. C. A. 7th, 1923.)

pianos from conditioning an exchange privilege on the dealer's agreement not to handle the products of competitors, this later holding appears to be based on the fact that this practice was a factor aiding in the effectuation of an unlawful resale price maintenance policy.¹⁵⁴

After the Second Circuit had joined in the use of "substantial lessening of competition or tendency to monopoly" as a basis for deciding that motion picture producers could refuse to lease films to exhibitors except in blocks of several films,¹⁵⁵ the Commission virtually abandoned attempts to enforce this section. While it has been suggested that Section 3 be amended, as was Section 2, to outlaw tying clauses whenever the effect thereof may be to injure competition between persons participating in the practice and their competitors, rather than to require a showing of substantial reduction of competition or tendency to monopoly,¹⁵⁶ no such amendment has yet been proposed in Congress.

It would seem that the Commission should meet with more success in the courts by condemning exclusive dealing contracts and full-line forcing practices under Section 5 of the F. T. C. Act, which statute does not impose the stringent requirements of the Clayton Act for showing a substantial lessening of competition or tendency toward monopoly. Moreover, the Commission has more discretion under the F. T. C. Act in defining an unfair method of competition than is possible under the provisions of the Clayton Act outlawing the practices only when used in making a lease or sale, or in fixing a price.¹⁵⁷

But the record shows that orders based on Section 5 have met a worse fate in the courts than those entered under the Clayton Act—not a one has been sustained. The block-booking methods of the film producers and the one-brand gasoline pump leases of the oil companies, which were held not to violate the Clayton Act, were also held not to constitute unfair methods of competition under the F. T. C. Act.¹⁵⁸ The block-booking case was decided on the authority of a previous decision of the Supreme Court in *F. T. C. v. Gratz*,¹⁵⁹ wherein the court had said that a corporation selling cotton bagging did not violate Section 5 by refusing to sell the bagging to purchasers who would not also buy the ties necessary to be used with the bagging in baling cotton unless the corporation had a monopoly.

In another case involving no clear statement of rationale, the Supreme

¹⁵⁴*Q. R. S. Music Co. v. F. T. C.*, 12 F. (2d) 730 (C. C. A. 7th, 1926).

¹⁵⁵*F. T. C. v. Paramount Famous-Lasky Corp.*, 57 F. (2d) 152 (C. C. A. 2d, 1932).

¹⁵⁶*M. E. Rose, Enforcement of Section 3 of the Clayton Act* (1940), 8 *GEO. WASH. L. REV.* 639.

¹⁵⁷In *F. T. C. v. Curtis Publishing Co.*, 260 U. S. 568 (1923), an order of the Commission based on Section 3 of the Clayton Act was set aside on the ground that the contract was one of agency rather than of sale.

¹⁵⁸*F. T. C. v. Paramount Famous-Lasky Corp.*, 57 F. (2d) 152 (C. C. A. 2d, 1932); *F. T. C. v. Sinclair Refining Co.*, 261 U. S. 463 (1923).

¹⁵⁹253 U. S. 421 (1920).

Court rejected the Commission's definition of unfair methods of competition as including a clause in a magazine publisher's contracts with its distributing agents whereby they agreed not to handle other magazines without its consent.¹⁶⁰

Insofar as the decisions under Section 5 of the F. T. C. Act have been based on an emphasis on monopoly, they have given the Act a narrower application than that given the Clayton Act, though there seems to be no justification for such construction in the language of the statute.

In any event, the result has been that the F. T. C. has not been able effectively to use either Section 3 of the Clayton Act or Section 5 of the F. T. C. Act as a basis for terminating tying clause practices and that little has been accomplished by the Commission in this field.¹⁶¹

Stock Control

Section 7 of the Clayton Act¹⁶² forbids the acquisition by one corporation of stock of another corporation where the effect of such acquisition may be substantially to lessen competition between the corporation whose stock is acquired and the corporation making the acquisition, or to restrain commerce in any section or community, or to tend to create a monopoly of any line of commerce. A similarly worded prohibition is directed against a corporation acquiring stock in two or more corporations where the effect of such acquisition or of the use of such stock by voting or granting proxies or otherwise may be substantially to lessen competition between the corporations whose stock is thus acquired, or to restrain commerce.

The first case to reach the courts under this section presented a situation rendered rather complex by apparent efforts to evade the terms of the statute. The situation was this: *X* corporation and *Y* corporation, competitors, organized *Z* corporation, with *X* holding one-third and *Y* holding two-thirds of the stock in *Z*, and *Y*'s assets were transferred to *Z*. The court, in a very liberal interpretation of Section 7, sustained the Commission's finding that the section had been violated, saying that the effect of the transaction was to limit the potential competition between *X* corporation and *Z* corporation, though the acquisition took place before competition had actually begun. And even if the effect was not to lessen competition, there was a tendency to create a monopoly.¹⁶³

A different judicial temper was evident in the next case, wherein it

¹⁶⁰F. T. C. v. Curtis Publishing Co., 260 U. S. 568 (1923).

¹⁶¹Witness the statement of a former chairman of the Commission: "The effect of the Gratz decision on the Commission was to paralyze its activity It began a definite series of efforts to enforce the Clayton Act [But it] crumbled at almost every touch and this effort was also abandoned." N. B. GASKILL, *THE REGULATION OF COMPETITION* (1936), 71.

¹⁶²38 STAT. 731 (1914); 15 U. S. C. § 18 (1934).

¹⁶³*Aluminum Co. of America v. F. T. C.*, 284 Fed. 401 (C. C. A. 3d, 1922), *cert. denied*, 261 U. S. 616 (1923).

was decided by the Supreme Court that where stock had been acquired in violation of Section 7, the Commission could order the violator so to divest itself of the stock as not to secure the assets of the corporation whose stock was acquired, but could not compel the divestiture of assets acquired by use of the alleged stock control before the Commission's complaint was filed.¹⁶⁴

This case initiated the principle of the race of diligence, but it remained for the *Arrow-Hart* case¹⁶⁵ to elevate that principle to its ultimate heights. In this case the Commission had issued a complaint against a holding company, charging it with holding all the voting stock in two competing corporations. While this complaint was pending, the holding company organized two dummy companies (for taxation purposes) and transferred the stock of one of the competing operating companies to each dummy corporation. In return, the stock of the dummy corporations was, by direction of the holding company, issued directly to its stockholders. Then, by merger of the two dummy corporations and the two operating corporations, a new corporation was formed, owning all the assets of the original operating companies. The Commission filed a supplemental complaint against the new corporation and, after proceedings thereunder, ordered it to divest itself of the stock and the assets of one of the operating companies. The Supreme Court set the order aside. Section 7, said Mr. Justice Roberts, does not prevent merger of competing companies, and the fact that the merger is effected by means of illegal stock control, after a complaint has been filed, cannot extend the Commission's jurisdiction. Mr. Justice Stone, joined by Chief Justice Hughes and Justices Brandeis and Cardozo, dissented, pointing out that the illegal holding company device was the first step in a scheme to eliminate competition, and contending that, under the provisions of Section 11 of the Clayton Act, it should be held that the Commission could undo a consummation of a transaction which, at an earlier stage, it could have prevented.

The net effect of the Supreme Court's holdings, then, is that while Section 7 gives the F. T. C. the power to forbid in advance the conversion of illegally-acquired stock into tangible assets, if the conversion is perfected before the Commission can comply with the procedural requirements of the statute and get its order entered the Commission has no power to set the conversion aside.¹⁶⁶

¹⁶⁴F. T. C. v. Western Meat Co., 272 U. S. 554 (1926).

¹⁶⁵*Arrow-Hart & Hegeman Electric Co. v. F. T. C.*, 291 U. S. 587 (1934). See discussion, p. 12, *supra*.

¹⁶⁶A proposal has been made to amend Section 7 to cover acquisition of assets. REP. ATT'Y GEN. (1926), 32. But this proposal has been criticized as "an attempt to undo the Rule of Reason by making section 7 cover what the Sherman Act was said to cover 30 years ago. Courts would then feel the practical necessity of making a Rule of Reason out of the Clayton Act and thus undoing it altogether." J. A. McLAUGHLIN, *op. cit.* 301, n. 94.

To this questionable construction of Section 7, the Supreme Court has added another: the word "substantial" in the phrase "to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition" is meant to qualify the word "competition," so that there can be no violation of Section 7, although a stock acquisition lessens actual competition between corporations, if that actual competition, as seen by the court, is not substantial.¹⁶⁷ And the competition was held not to be substantial where 95 per cent of the products of two shoe companies went to the consumers through different trade channels and where one of them was in such bad financial condition that it could not have remained in business by itself. The dissenters, Justices Stone, Holmes and Brandeis, apparently accepted the majority's construction of the statute, but pointed out that the fact that the companies sold through different trade channels did not mean that they weren't competing for the same ultimate consumer market, and maintained also that the Commission was justified in deciding that the business of the financially embarrassed company, conducted through a receiver or a reorganized company, would have continued to compete with the other manufacturer.

The majority's interpretation of the statute would be a proper one if its terms forbade only stock acquisition which injured competition generally, but it is clearly a misinterpretation where the statute specifically protects competition between the corporations. There is no occasion for an appraisal of the amount of that competition, if some competition does in fact exist. But, in two cases decided since the Supreme Court case, the Circuit Courts have joined with the Supreme Court in emasculating the "competition between corporations" provision. In *Temple Anthracite Coal Co. v. F. T. C.*,¹⁶⁸ the court found no violation of Section 7 because the total output of the competing companies was so small that if competition between them were lessened, its effect on the whole interstate trade would not tend to create a monopoly. This *vi et armis* identification of two tests which are specified disjunctively in the statute gives the statute an even narrower application than does the Supreme Court decision. *V. Vivaudou, Inc., v. F. T. C.*,¹⁶⁹ introduced a third technique—it simply ignored the "competition between corporations" provision. Finding that the acquisition of stock in a corporation doing a four million dollar cosmetics business by a corporation doing a three million dollar business did not result in a tendency to monopoly or a restraint of commerce, where the total annual cosmetics business in the United States was \$125,000,000, the court concluded that Section 7 was not violated.

As a result of all of this judicial mangling of statutory language,

¹⁶⁷*International Shoe Co. v. F. T. C.*, 280 U. S. 291 (1930).

¹⁶⁸51 F. (2d) 656 (C. C. A. 3d, 1931).

¹⁶⁹54 F. (2d) 273 (C. C. A. 2d, 1931).

Section 7 of the Clayton Act, like Section 3, has seldom been enforced by the Commission. As of October, 1939, only thirteen cease and desist orders had been entered in intercorporate stock acquisition proceedings. Of the fifty-one discontinuances or dismissals of complaints after hearings were completed,¹⁷⁰ a large number may safely be assumed to have been due to the unwillingness of the Commission to risk further reversals in court.

Interlocking Directorates

Under Section 8 of the Clayton Act,¹⁷¹ it is unlawful for any person to be at the same time a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, if such corporations are or were theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of the provisions of the Sherman Act, the Clayton Act, or Sections 73-77 of the Wilson Tariff Act.

There has been practically no litigation under this section by the Commission. Four cases thereunder have been discontinued or dismissed,¹⁷² and a provision in one consent decree entered in 1929 enforced the section against one director.¹⁷³ Otherwise, the interlocking directorship provisions have not been invoked.

The reason for the non-enforcement of this section is probably not alone that it would be most difficult for the Commission to prove that a hypothetical agreement between the corporations involved would violate the Sherman, Clayton or Wilson Acts,¹⁷⁴ but also that the section has not been violated. The absence of violation may be explained, at least in part, by the ease with which its purpose may be circumvented. The terms of the statute may be strictly complied with and yet there may be a common direction of nominally independent competitors, achieved through a common ownership of stock.¹⁷⁵ The owner of the stock has only to exercise his voting control through different trusted representatives in order to secure complete cooperation in managerial policies of the ostensible competitors.¹⁷⁶ Ergo, it must be concluded that Section 8 is practically ineffectual.¹⁷⁷

¹⁷⁰G. H. Montague, *The Commission's Jurisdiction over Practices in Restraint of Trade*. (1940), 8 GEO. WASH. L. REV. 365, 377.

¹⁷¹38 STAT. 732 (1914), amended as to provisions not material here, 39 STAT. 121 (1916), 41 STAT. 626 (1920), 45 STAT. 253 (1928); 45 STAT. 1536 (1929); 49 STAT. 718 (1935), 15 U. S. C. § 19 (Supp., 1939).

¹⁷²G. N. MONTAGUE, *op. cit.* 375.

¹⁷³*In re* General Outdoor Advertising Co., Federal Anti-Trust Laws (1931), 209.

¹⁷⁴The section is criticized on this ground in G. C. HENDERSON, *op. cit.* 38.

¹⁷⁵Section 7 applies only to stock holdings by corporations.

¹⁷⁶"The few cases arising under this part of the statute are probably due to the fact that its requirements can readily be met and the desired results obtained by other means." F. T. C., ANNUAL REPORT (1927), 17.

¹⁷⁷It has been suggested that the section is not simply innocuous, but

Conspiracy and Boycotting

The Commission has construed the "unfair methods of competition" of Section 5 of the F. T. C. Act to apply to concerted action among trade competitors to enforce the use of "regular" channels of trade, to control prices, or to eliminate a competitor or a competing line of products.¹⁷⁸ Probably in large part because the Sherman Act covers this field, the Commission's interpretation has been upheld by the courts.¹⁷⁹

In the first of these cases to reach the courts, an association of manufacturers and retailers had adopted a policy whereby the manufacturers refused to sell to persons doing a combined jobber-retailer business, and the retailers refused to buy from manufacturers who sold to the jobber-retailers. The F. T. C.'s order directing the termination of this general trade boycott was affirmed.¹⁸⁰ Subsequently, the Commission was sustained in its application of Section 5 to a boycott imposed by jobbers and wholesalers upon manufacturers who sold their products at jobbers terms and prices to a dealer doing both a wholesale and a retail business, the court placing much emphasis upon the element of combination and declaring that the action condemned violated the public policy expressed in the Sherman Act.¹⁸¹ Similarly, it has been held that Section 5 is violated when wholesalers and manufacturers conspire to prevent sale by manufacturers directly to retailers or to cooperative purchasing associations formed by retailers.¹⁸²

Where the conspiracy is between members of the trade, fixing a horizontal price level at which all competing products will be sold, the Commission's interpretation of Section 5 has not been seriously challenged, the contest in court being based upon alleged insufficiency of the evidence, or lack of jurisdiction over the conspirator.¹⁸³

harmful, in that, without affording any protection against monopolization or control of the market, it deprives business of the direct counsel of the most competent and best informed business leaders. *M. N. WATKINS, PUBLIC REGULATION OF COMPETITIVE PRACTICE IN BUSINESS ENTERPRISE* (1940), 234.

¹⁷⁸*Ibid.*, 231.

¹⁷⁹Cease and desist orders directed against an attempt to suppress competition by boycott, *Utah-Idaho Sugar Co. v. F. T. C.*, 22 F. (2d) 122 (C. C. A. 8th, 1927), and against a conspiracy to limit production, *California Rice Industry v. F. T. C.*, 102 F. (2d) 716 (C. C. A. 9th, 1939), have been set aside on the ground that the practices condemned were not employed in interstate commerce, hence were not within the Commission's jurisdiction.

¹⁸⁰*National Harness Mfrs. Ass'n v. F. T. C.*, 268 Fed. 705 (C. C. A. 6th, 1920).

¹⁸¹*Wholesale Grocers' Ass'n v. F. T. C.*, 277 Fed. 657 (C. C. A. 5th, 1922).

¹⁸²*Arkansas Wholesale Grocers' Ass'n v. F. T. C.*, 18 F. (2d) 866 (C. C. A. 8th, 1927), *cert. denied*, 275 U. S. 533 (1927); *Southern Hardware Jobbers' Ass'n v. F. T. C.*, 290 Fed. 773 (C. C. A. 5th, 1923).

¹⁸³*F. T. C. v. Pacific States Paper Trade Ass'n*, 273 U. S. 52 (1927); *California Rice Industry v. F. T. C.*, 102 F. (2d) 716 (C. C. A. 9th, 1939). Ten years after the order was affirmed in the *Pacific States* case, the association and several of its members were found in contempt of court for violating it. *F. T. C. v. Pacific States Paper Trade Ass'n*, 88 F. (2d) 1009

Nor has the Commission encountered any difficulty in securing enforcement of orders directed against a conspiracy between jobbers and manufacturers whereby the manufacturers refused to give the same prices to a wholesale company as were given to the jobbers,¹⁸⁴ a horizontal combination to boycott a competitor,¹⁸⁵ and threats by a retailers' association to boycott manufacturers who sold to non-member retailers.¹⁸⁶ And in *Butterick Publishing Co. v. F. T. C.*,¹⁸⁷ it was held to be an unfair method for publishers, acting jointly, to refuse to sell their magazines to retailers who also sold second-hand magazines at cut prices.

It has been definitely established that a one-man boycott does not violate Section 5, though imposed for the purpose of compelling a manufacturer to cease selling to a competing wholesaler,¹⁸⁸ or enforcing a resale price maintenance policy.¹⁸⁹ Collusion is an essential element to the establishment of an unfair method of competition in these cases. Section 5 does not deprive the business man of his "vested" right to refuse to deal with anyone for any reason sufficient to himself unless that right is exercised in a manner contrary to the public policy declared in the Sherman Act.

Resale Price Maintenance

At one time the Commission was quite active in prosecuting resale maintenance schemes under Section 5. The Supreme Court had held that it was an unfair method for a manufacturer to enforce such a scheme by refusing to sell to price-cutting dealers until it had received their assurance that they would thereafter maintain the price specified by the manufacturer, and by employing an elaborate espionage system involving lists of non-cooperative dealers, identifying marks on the products sold, investigation and reporting by salesmen, and soliciting of information on price-cutting from other dealers.¹⁹⁰

Thereafter, the Circuit Courts occupied themselves in trying to determine how many of the above elements were determinative in the Supreme Court's decision. It was quite universally assumed that the agreement of the chastened price cutter to maintain the fixed price as a condition to further business with the manufacturer was an essential element of the unfair method, though that agreement need not be embodied in an enforceable contract.¹⁹¹ Conversely, there was unanimity

(C. C. A. 9th, 1937).

¹⁸⁴*Western Sugar Refinery Co. v. F. T. C.*, 275 Fed. 725 (C. C. A. 9th, 1921).

¹⁸⁵*Chamber of Commerce v. F. T. C.*, 13 F. (2d) 673 (C. C. A. 8th, 1926).

¹⁸⁶*F. T. C. v. Wallace*, 75 F. (2d) 733 (C. C. A. 8th, 1935); *California Lumberman's Council v. F. T. C.*, 115 F. (2d) 178 (C. C. A. 9th, 1940).

¹⁸⁷85 F. (2d) 522 (C. C. A. 2d, 1936).

¹⁸⁸*F. T. C. v. Raymond Bros.*, 263 U. S. 565 (1924).

¹⁸⁹*American Tobacco Co. v. F. T. C.*, 9 F. (2d) 570 (C. C. A. 2d, 1925), *aff'd* without review, 274 U. S. 543 (1927).

¹⁹⁰*F. T. C. v. Beech-Nut Packing Co.*, 257 U. S. 441 (1922).

¹⁹¹*Armant Co., Inc. v. F. T. C.*, 78 F. (2d) 707 (C. C. A. 2d, 1935);

in the determination that the lists of recalcitrant dealers and the identifying symbols on the products were not essential.¹⁹² But the unanimity was broken when the Second and Sixth Circuits disagreed with the Eighth as to the significance of the solicitation of cooperation from other dealers in discovering price cutters.¹⁹³

Before this judicial speculation—which seems to have resolved itself into a determination of the method as fair or unfair according to the degree of its efficiency—could proceed further, Congress enacted the Miller-Tydings Act,¹⁹⁴ amending Section 1 of the Sherman Act and expressly exempting from the provisions of the Sherman Act and of Section 5 of the F. T. C. Act contracts fixing the minimum resale price of any branded or trade-marked article which is “in free and open competition with commodities of the same general class” where such contracts are lawful as applied to intrastate transactions in the state in which the resale is to be made. Since the privilege of stipulating the resale price is not limited to the owner of the brand or trade mark, jobbers and wholesalers apparently may fix the resale figure. And since forty-five states have now adopted “fair trade” laws, the scope of the exemption is almost as wide as the interstate commerce jurisdiction of the Commission.¹⁹⁵ There have been no proceedings against persons using a resale price maintenance policy subsequent to the enactment of this statute.¹⁹⁶

Passing Off

Early cases sustained the Commission in its efforts under Section 5 to prevent the attempts of manufacturers and producers to simulate the trade-marks and trade-names of well-known competitors, and thus to trade on the competitor's reputation by passing off their products as those of the competitor. Since the term “unfair competition” has its

Shakespeare Co. v. F. T. C., 50 F. (2d) 758 (C. C. A. 6th, 1931); Harriet Hubbard Ayer, Inc. v. F. T. C., 15 F. (2d) 274 (C. C. A. 2d, 1926); Cream of Wheat Co. v. F. T. C., 14 F. (2d) 40 (C. C. A. 8th, 1926); Q. R. S. Music Co. v. F. T. C., 12 F. (2d) 22 (C. C. A. 7th, 1926); Moir v. F. T. C., 12 F. (2d) 730 (C. C. A. 1st, 1926); Toledo Pipe-Threading Machine Co. v. F. T. C., 11 F. (2d) 337 (C. C. A. 6th, 1926); American Tobacco Co. v. F. T. C., 9 F. (2d) 570 (C. C. A. 2d, 1925); Hills Bros. v. F. T. C., 9 F. (2d) 481 (C. C. A. 9th, 1926); Oppenheim, Oberndorf & Co. v. F. T. C., 5 F. (2d) 574 (C. C. A. 4th, 1925).

¹⁹²*Ibid.*

¹⁹³Harriet Hubbard Ayer, Inc. v. F. T. C., 15 F. (2d) 274 (C. C. A. 2d, 1926); Toledo Pipe-Threading Machine Co. v. F. T. C., 11 F. (2d) 337 (C. C. A. 6th, 1926); Cream of Wheat v. F. T. C., 14 F. (2d) 40 (C. C. A. 8th, 1926).

¹⁹⁴50 STAT. 693 (1937), 15 U. S. C. § 1 (Supp. 1939). For the Commission's opposition to this Act, see its letter to President Roosevelt, reproduced in G. H. MONTAGUE, *op. cit.* 382.

¹⁹⁵But note that the Miller-Tydings Act does not withdraw the application of section 5 to practices fixing *maximum* or *absolute* retail prices, although some of the state acts allow this practice.

¹⁹⁶M. N. WATKINS, *op. cit.* 104.

origin in the passing-off cases,¹⁹⁷ the Circuit Courts encountered no difficulty in finding that this was an unfair method of competition.¹⁹⁸ But in *F. T. C. v. Klesner*,¹⁹⁹ the Supreme Court held that proceedings to terminate the use of a trade name in alleged violation of the rights of the first user, where there was a dispute as to who had the right to use of the name, were not in the interest of the public and that therefore the complaint was improperly issued.

Although the decision in this case would seem to preclude any prosecution of "passing off" practices, the Commission has continued its campaign against such methods. But its activity seems to have been limited to the prosecution of cases wherein there is a deliberate stealing of commercial good will, with no pretense of legal rights,²⁰⁰ and this distinction may serve to avoid the rule of the *Klesner* decision when the next case reaches the courts.

Disparagement

The Commission has determined that disparagement of a competitor or his products is an unfair method. While its orders have been reversed on the ground of inadequacy of evidence,²⁰¹ and lack of public interest in the protection of misbranded articles,²⁰² its interpretation of Section 5 as including this practice has been sustained in cases involving express disparaging statements about a competitor's products²⁰³ or business methods,²⁰⁴ and in a case where the respondent's false representations as to the value received for its prices as compared to that received for its competitors' prices were so stated as to induce the public to believe that the competitors were unfair.²⁰⁵

Vexatious Litigation

The F. T. C. has issued orders against vexatious litigation and threats of litigation under Section 5. In two of the three cases that have come before the courts, the Commission's order has been reversed for inadequacy of evidence to sustain the finding of vexatious threats;²⁰⁶ in the remaining case the order was sustained on a determination that

¹⁹⁷M. Handler, *Unfair Competition and The Federal Trade Commission* (1940), 8 GEO. WASH. L. REV. 399, 412; HARPER, TORTS (1933), 495.

¹⁹⁸*Masland Durable Leather Co. v. F. T. C.*, 34 F. (2d) 733 (C. C. A. 3d, 1929); *Lighthouse Rug Co. v. F. T. C.*, 35 F. (2d) 163 (C. C. A. 7th, 1929); *F. T. C. v. Balme*, 23 F. (2d) 615 (C. C. A. 2d, 1928); *Juvenile Shoe Co. v. F. T. C.*, 289 Fed. 57 (C. C. A. 9th, 1923); *cert. denied*, 263 U. S. 705 (1923).

¹⁹⁹280 U. S. 19 (1929).

²⁰⁰*In re Holmes, Inc.* 23 F. T. C., 650 (1936); *In re New England Collapsible Tube Co.*, 22 F. T. C. 1 (1930); *In re Roberts Tailoring Co.*, 14 F. T. C. 1 (1930); *In re James Kelly*, 13 F. T. C. 289 (1930).

²⁰¹*Philip Cary Mfg. Co. v. F. T. C.*, 29 F. (2d) 49 (C. C. A. 6th, 1928).

²⁰²*John Bene & Sons v. F. T. C.*, 299 Fed. 468 (C. C. A. 2d, 1924).

²⁰³*Perma-Maid Co. v. F. T. C.*, 121 F. (2d) 282 (C. C. A. 6th, 1941).

²⁰⁴*Chamber of Commerce v. F. T. C.*, 13 F. (2d) 673 (C. C. A. 8th, 1926).

²⁰⁵*Sears, Roebuck & Co. v. F. T. C.*, 258 Fed. 307 (C. C. A. 7th, 1919).

²⁰⁶*Flynn & Emrich Co. v. F. T. C.*, 52 F. (2d) 836 (C. C. A. 4th, 1931); *Heuser v. F. T. C.*, 4 F. (2d) 632 (C. C. A. 7th, 1925).

vexatious litigation was an unfair method.²⁰⁷ While the last case constitutes judicial authority for the Commission's interpretation of the statute, there is a dictum in one of the other cases²⁰⁸ to the effect that there is no public interest in a proceeding to protect one competitor. However, this dictum was based upon a rather indiscriminating conception of the doctrine of the *Klesner* case, so that the Commission may yet be fully sustained in its action in this field.

Miscellaneous Practices

The Commission has been sustained in its holding that a false advertisement to the effect that products of the respondent have been adopted by the United States government is an unfair method of competition.²⁰⁹ Similarly, an order directing the cessation of the use of testimonials not given by the person whose name was used has been upheld.²¹⁰ But the Second Circuit has reversed an order directing the respondent to cease the use of admittedly truthful testimonials of famous people without revealing that they were paid for writing them.²¹¹

The Supreme Court has approved an order directing a large motion picture film manufacturer to cease coercing film development companies into contracting to buy all their film from it by threatening to enter the film development field as a competitor.²¹²

Three orders have been entered forbidding the acquisition of trade secrets by espionage or bribing of employees,²¹³ none of which has been reviewed by the courts. But in a case involving the securing of business information, not appearing to be in the nature of a trade secret, by sending employees of the respondent to pose as prospective customers of a competitor, the order of the Commission was reversed on the ground that there was no evidence that the information so acquired was used in any unlawful manner so as to hinder or stifle competition.²¹⁴

Inducing employees of competitors to breach their employment contracts or merely to abandon non-contractual employment in such numbers or under such circumstances as to hinder the competitor has been forbidden by F. T. C. orders,²¹⁵ but the validity of such orders has not been adjudicated.

²⁰⁷*Chamber of Commerce v. F. T. C.*, 13 F. (2d) 673 (C. C. A. 8th, 1926).

²⁰⁸*Flynn & Emrich Co. v. F. T. C.*, 52 F. (2d) 836 (C. C. A. 4th, 1931).

²⁰⁹*Guaranty Veterinary Co. v. F. T. C.*, 285 Fed. 853 (C. C. A. 2d, 1922).

²¹⁰*F. T. C. v. Standard Education Society*, 86 F. (2d) 692 (C. C. A. 2d), 1936).

²¹¹*Northam Warren Corp. v. F. T. C.*, 59 F. (2d) 196 (C. C. A. 2d, 1932).

²¹²*F. T. C. v. Eastman Kodak Co.*, 274 U. S. 619. (1927), discussed p. 12, *supra*.

²¹³*In re U. S. Hoffman Machinery Corp.*, 5 F. T. C. 439 (1923); *In re Allen Sales Service*, 1 F. T. C. 459 (1919); *In re Standard Car Equipment Co.*, 1 F. T. C. 144 (1918).

²¹⁴*Philip Carey Mfg. Co. v. F. T. C.*, 29 F. (2d) 49 (C. C. A. 6th, 1928).

²¹⁵*In re Olson*, 8 F. T. C. 449 (1925); *In re Sunlight Creameries*, 4 F. T. C. 55 (1921).

The practice of buying up supplies for the purpose of causing a shortage to competitors, a trade tactic similar to the old common law offenses of forestalling, engrossing and regrating, but pursued for a perhaps more censurable purpose, has been forbidden in two orders.²¹⁶ While neither of these cases reached the courts, it does not seem improbable that the Commission would be sustained, providing that it can convince the court that the practices of the respondent were pursued for the purpose charged.

(To be continued)

²¹⁶*In re United Rendering Co.*, 3 F. T. C. 284 (1921); *In re American Agricultural Co.*, 1 F. T. C. 226 (1918).